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Judge Davis
— Reversed

Miller D
writes

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. ~~249.~~ 38

FRANCIS DAINESE, APPELLANT,

vs.

THE BOARD OF PUBLIC WORKS OF THE DISTRICT OF COLUMBIA, CONSISTING OF HENRY D. COOKE, ALEXANDER R. SHEPHERD, SAMUEL P. BROWN, JAMES A. MAGRUDER, AND ADOLPH CLUSS.

APPEAL FROM THE SUPREME COURT OF THE DISTRICT OF COLUMBIA.

FILED OCTOBER 14, 1873.

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1 *Bill of complaint.—Filed Jan. 2d, 1872.*

In the supreme court of the District of Columbia.

HENRY D. COOKE, ALEXANDER R. SHEPherd, Samuel P. Brown, James A. Magruder, & Adolph Cluss, composing the board of public works for said District, pl'tf's,
vs.
FRANCIS DAINESE AND WESLEY FREY, def'ts.
} Equity doc. No. —.

To the supreme court of the District of Columbia, holding an equity court:

1. The plaintiffs, Henry D. Cook, Alexander R. Shepherd, Samuel P. Brown, James A. Magruder, Adolf Cluss, constituting and composing the board of public works for said District, state as follows:

That, agreeably to the provisions of an act of Congress of the
2 United States entitled "An act to provide a government for the District of Columbia," approved February 21st, 1871, they were appointed members of the board of public works for said District and duly qualified as such, and now compose said board.

2nd. The defendants are citizens and residents of the District of Columbia.

3d. That among other duties devolved upon the pl'tf's by the act of Congress aforesaid is that of making regulations in relation to the construction of buildings in said District; and that, in the performance of said duty, on the 19th of August, 1872, they adopted and caused to be published building-regulations, a copy of which is hereto annexed, and part hereof, as Exhibit A. That Adolf Cluss was appointed superintendent of buildings, and charged with their immediate enforcement.

3 4th. That the def't Dainese is the owner of certain lots of ground in the city of Washington, on the south side of C street, between 6th & 7th st's east, on which he is engaged erecting a block of houses fifteen feet (15) front each by fifty feet (50) deep, and three (3) stories high, under a contract with one Wesley Frey, the other def't; that said buildings are being constructed in violation of the building-regulations aforesaid, especially sections 3, 5, 6, 9, 32, 33, 66; that the mode of construction is dangerous & improper, and such as should not exist in said city; that the defendant was notified by said Adolf Cluss, on the 22d of November, 1872, that said buildings were of insufficient material and dangerous to the community and in violation of said regulations, and that they must be removed, or that he would have the same done, as will appear more fully by reference to said letters attached here-
4 to as Exhibit B, and made part hereof, as well as to the letter or report of the board of health in relation thereto, hereto annexed as Exhibit C, and made part hereof.

5th. That, notwithstanding said notice and the fact that said building is being constructed in violation of said rules, the defendants persist in construction of the same and in refusing to remove the same; and, as to the character of said buildings, they further refer to the affidavits & statements of Thomas B. Entwisle, a master-builder, A. B. Mullett, architect, and Hoffman, hereto annexed as Exhibits D, E, F.

6th. That the construction of said buildings will not only be in viola-

tion of said regulations, but also be of great danger to the community residing in the vicinity of their location, and be productive of great and irreparable loss. Wherefore the plaintiffs pray *that* the honorable court for a subpœna against Francis Dainese and Wesley Frey, the defendants, compelling them to appear and answer the matters and things herein contained, and for a restraining injunction againt the said defendants, their agents, workmen, and employees, to prevent the further construction of said buildings; and for such other and further relief as to the said court may seem proper; and they will pray, &c.

H. D. COOK.
ADOLF CLUSS.
JAMES A. MAGRUDER.

WILLIAM A. COOK, *Sol. for Pl'ff.*

DISTRICT OF COLUMBIA,
County of Washington, ss:

I, Adolf Cluss, do solemnly sweare that I have read the bill by me subscribed and know the contents thereof; and that the facts contained therein upon my own knowledge stated are true, and the facts therein stated upon the information of others I believe to be true.

ADOLF CLUSS.

Subscribed & sworn to before me this 30th day of December, 1872.
CHARLES WALTER, *J. P.*

6 EXHIBIT A.

Building regulations of the District of Columbia, established by the board of public works agreeably to the provision of the 37th section of the act of Congress entitled "An act to provide a government for the District of Columbia," approved February 21, 1871. Washington: Republican job-office print, 1872.

6*a* BOARD OF PUBLIC WORKS, DISTRICT OF COLUMBIA,
Washington, August 19, 1872.

The act of Congress creating the present government for the District of Columbia prescribes, among the duties of the board of public works, that "they shall make all necessary regulations respecting the construction of private buildings in the District of Columbia, subject to the supervision of the legislative assembly."

It is therefore ordered that the following rules and regulations providing for the construction, alteration, repair, and removing of buildings in said District, and for their inspection, be in force from and after date:

SECTION 1. All that portion of the District of Columbia lying within the limits of the cities of Washington and Georgetown shall constitute the building-limits designated under these rules, in which all walls, structures, buildings, or parts thereof, except bridges, quays, wharves, or buildings belonging to the Government of the United States, shall hereafter be built, altered, or repaired in conformity with the provisions of these rules.

Building-limits.

SEC. 2. In the construction of these rules the following terms shall have the respective meaning hereinafter assigned to them: "External wall" shall apply to every outer wall or vertical enclosure of a building other than a party-wall.

Definitions of technical terms.

"Party-wall" shall apply to every wall used or built as a separation of any building from any other building, with a view to the same being occupied by different persons, or intended to be hereafter used for that purpose.

"Partition-wall" shall be understood to mean any interior wall of masonry or brick-work.

"Partition" shall be construed to mean any interior division constructed of iron, glass, wood, lath and plaster, or either of these materials combined.

"Foundation-wall" shall be understood to mean that portion of
6b any exterior wall below the level of the adjoining earth or pavement, and that portion of any partition or party wall below the level of the basement or cellar floor.

"Cellar" shall be construed to mean the lowest story of a building, if partially or entirely below the level of the adjoining street or ground, and not suitable for habitation.

"Basement" shall be construed to mean a story partially below the level of the adjoining street, and suitable and adapted for habitation.

"First story" shall be construed to mean the story the floor of which is first above the level of the sidewalk or adjoining ground. The other stories shall be numbered in regular succession, counting upward.

"Attic-story" shall be construed to mean a story situated either in whole or in part in the roof.

"Wooden building" shall be construed to include any building of which any external or party wall is constructed in whole or in part of wood.

"Tenement-house" shall be construed to include every house, building, or portion thereof, which is rented, leased, let, or hired out to be occupied, or is occupied as the house or residence of more than three families living independently of another, and doing their cooking upon the premises, but having a common right in the halls, stair-way, yard, water-closets or privies, or some of them.

"Lodging-house" shall be construed to mean and include any house, building, or portion thereof, in which persons are lodged for hire for a single night, or for less than a week at one time.

"Shed" shall be construed to mean a structure, one or more sides of which are entirely or mainly open.

"Building owner" shall be construed to mean such one of the owners of the premises separated by or adjoining to any party-structure as is desirous of executing any work in respect to such party-structure, and the owner of the other premises shall be called the "adjoining owner."

SEC. 3. The inspector of buildings under the board of public works
Enforcement of rules. of the District of Columbia shall be charged with the survey and inspection of buildings and the enforcement of these rules.

6c SEC. 4. The inspector of buildings shall, before he enters upon
Inspector of buildings. the duties of his office, take and subscribe an oath or affirmation that he will faithfully, impartially, and truly execute and perform the duties imposed upon him under these rules, and enforce the rules fairly according to the best of his judgment and ability; which said oath or affirmation shall be filed in the office of the board of public works. He shall, moreover, before entering on the duties of his office, execute a bond to the board of public works in the sum of twenty thousand dollars, with three sureties, to be approved by the said board at a regular meeting, conditioned for the faithful performance of the

duties as enumerated above; which bond shall be for the use of any or all persons who may be aggrieved by the act or neglect of said officer.

Duties of inspector.

SEC. 5. It shall be the duty of the inspector of buildings to sign all certificates and notices required to be issued under these rules; to keep on file all applications and notices received; to keep the record of all violations of any of these rules, and all other matters relative thereto; report them, when necessary, to the attorney of the board of public works, who shall prosecute them without delay; and no suit shall be discontinued or compromised unless by express orders of the board of public works, issued at a regular meeting; to keep on hand blanks for applications and complaints, which shall be used by those having business to transact with the inspector, on all occasions for which they are intended; to make an annual report of the operations of his office to the board of public works.

In pector to examine buildings.

SEC. 6. The inspector of buildings shall examine all houses or buildings in course of erection, alteration, or repair, as often as necessary, to see that they are erected, constructed, altered, or repaired in accordance with the requirements of these rules; that the materials used are suitable for the purpose, and that the work is done in a substantial manner, and is of sufficient strength and solidity to answer the purpose for which it is designed. It shall also be his duty to examine all buildings observed or reported as dangerous, and to make a record of all such examinations, with the name of the street and the number of the building, the names of the owner or lessee, and for what purpose occupied; and, in case of fire, the probable origin thereof. He shall examine any buildings under application to raise, enlarge, alter, or build upon, when necessary, and make a record of the condition of the same. He shall, on application for that purpose, furnish the owner or owners, contractor or contractors, his certificate that their houses or buildings are in all respects conformable to law and properly constructed.

6d

Assistant inspectors.

SEC. 7. The inspector of buildings shall, by and with the approval of the board of public works, have power to appoint assistant inspectors, to assist him in the performance of his duties, who shall be architects, or able and experienced mechanics, competent to perform all the duties of the office to which they are appointed; and, should the inspector of buildings be prevented by illness or any other unavoidable circumstances from attending to the duties of his office, he may, with the consent of the board of public works, appoint some other person as his deputy to perform all his duties for such time as he may be temporarily prevented from executing them. And the inspector of buildings shall also have been engaged in conducting or carrying on business as an architect or builder for at least seven years, of which he shall make oath before the board of public works.

Right to enter buildings.

SEC. 8. The officer or officers charged with the enforcement of these rules shall, as far as may be necessary for the performance of their duties, have the right to enter any building or premises within the aforesaid building-limits upon showing a badge designating their office; and any person who shall interfere with or prevent him or them in the performance of his or their duties shall be liable to a fine of not less than ten nor more than forty dollars.

Building permit.

SEC. 9. Persons intending to erect any new building or to alter any house or building, so as to make it substantially a new building, or so as to touch its stability or safety, must make written application for, and obtain, the permit before commencing work, under a penalty of fifty dollars for each violation of this rule.

6e Plans and specifications of the proposed improvements shall be submitted to the inspector of buildings whenever he is in doubt about the propriety of issuing the permit. In case the permit is refused, an appeal may be taken to the board of public works, the said appellant to state in writing the ground on which the appeal is based. In general, appeals may be taken in like manner to the board of public works from all rulings of the inspector of buildings.

Occupation of street for building purposes.

SEC. 10. It shall and may be lawful for any person or persons engaged in erecting or repairing a building to occupy, with the building-materials, the inside half of the breadth of the foot-way and one-third part of the breadth of the carriage-way, and no more, in front of any lot on which the building is being erected or repaired; and the inspector of buildings shall, with the consent of either adjoining owner, be authorized to permit the occupation of the frontage of one adjoining lot in special cases and for the same purposes; said materials to be placed in such position and so arranged as may be approved by the inspector of buildings or his duly-authorized agent; but no gutter shall thereby be obstructed so as to prevent the free passage of the drainage of the same: provided, however, that nothing herein contained shall prevent the granting of permits for the temporary damming of a gutter for collecting water for building purposes when there are no other available means, and under such conditions as the inspector of buildings may prescribe. No streets laid with modern pavements shall be used for the purpose of making mortar unless such be done in a tight mortar-pan, and nothing shall be construed in this section so that the free passage of wagons, carts, drays, or other carriages may be obstructed or impeded.

The inspector of buildings may issue permits for erecting temporary sheds at building sites for the use of builders.

All materials and rubbish shall be removed by the contractor or owner of the property within five days after said building shall be completed, or when directed by the proper officer or officers.

Protection in front of excavation.

SEC. 11. It shall not be lawful for any person or persons to make any excavation for a cellar, vault, or other structure, or cause it to be done, upon the front or side of any lot adjoining a street without properly protecting the same.

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Vaults.

SEC. 12. Vaults may be made not beyond the inner line of the pavement-curb, to be securely covered with substantial flagging, or arched with hard brick, the crown of the arch to be at least twelve inches below the established surface of the foot-way; and any opening in the top of the vault shall be adjoining to or near the curb-stone, and have a suitable iron grating or covering placed therein, and no iron grating or other fixture shall project above or be sunk below the established graduation of the pavement.

Projections beyond building-line.

SEC. 13. No projections, porticos, bay-windows, areas, steps, or cellar-doors shall be made or increased beyond the building line without a special permit having been obtained.

Construction of buildings.

SEC. 14. Every building, with the exceptions hereinafter mentioned, shall be built of brick, stone, iron, or other hard and incombustible material, and with foundations resting upon the solid ground, or upon concrete, piles, planks, or other solid substructure. Every wall, constructed of brick, stone, or other similar substance, shall be properly bonded and solidly built with lime or cement mortar. The thickness of every wall as hereinafter determined shall be the minimum thickness for dwellings, and, as applied to solid walls, laid with block stone in horizontal courses, or with brick. If any walls are laid with

irregular rubble-work, the thickness shall be one-fourth greater than the thickness given below. Thin ashlar-facings shall not be counted in determining the thickness of walls under these rules. In all buildings hereafter erected, situated on the street corner, the bearing-wall thereof, that is, the wall on the street upon which the beams rest, shall be four inches thicker in all cases than is otherwise provided for by these rules.

Thickness of walls.

SEC. 15. The thickness of the walls of all buildings hereafter erected, constructed, built, or altered shall be as follows, to wit: In all buildings not more than thirty-five feet high and less than twenty-five feet in width, the cellar or foundation walls shall be not less than thirteen inches in thickness, the external and party walls not less than nine inches; for buildings of same height, but twenty-five feet or more in width, the external and party walls shall not be less than thirteen inches thick for the full height thereof; in all buildings exceeding thirty-five but not exceeding forty-five feet in height, the cellar or foundation walls shall not be less than eighteen inches in thickness, the front and party walls of stories above not less than thirteen inches in thickness; in all buildings exceeding forty-five, but not exceeding fifty-five feet in height, the foundation or cellar walls shall not be less than eighteen inches in thickness, the party-walls not less than thirteen inches, and the front walls not less than eighteen inches to the height of the first story, and thirteen inches the remainder of the height; and whenever any builder, owner, or contractor may construct or erect any building to a greater height than those above specified, or for other purposes than dwellings, the increased thickness of the walls shall be determined by the inspector of buildings; provided, that in any case where the proposed building is to be used for a store-house, or similar purposes, the party or division walls shall not be less than thirteen inches the full height thereof. The height of all walls as above shall be computed from the curb-level. The bottom course for all foundation-walls resting upon the ground shall be at least nine inches wider than the thickness above given for the foundation-walls.

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Recesses and openings in walls.

SEC. 16. No recess of any kind shall be made in any nine-inch party-wall. Whenever it becomes desirable to cut a door-way through any party-wall separating two buildings, a notice of the intention to do so shall be filed with the inspector of buildings, who shall decide what safeguards are necessary for the closing of said door-way during the time it is not used.

Walls, how carried up and anchored.

SEC. 17. All the inclosing walls of a building must be brought up simultaneously, and in no case shall the work on the side walls be ahead of the work on the front wall more than the height of one story.

The side, end, or party walls shall be anchored at each tier of beams, at intervals of not more than ten feet apart, with good strong wrought-iron anchors, one-half inch by one inch, well built into the side walls and well fastened to the side of the beams by not less than three wrought-iron nails, at least one-fourth of an inch in diameter, so as to form continuous ties across the building on each floor.

6h

Walls to be coped when not corniced.

SEC. 18. All party-walls shall be brought up through the roof-covering and shall be built up at least six inches above the flat of the roof of the highest building of which such wall forms a part for the full extent of the flat, and shall be covered by brick laid on slate, or a coping of stone or metal, and so as effectually to prevent the connection of the roofing of any two or more houses or buildings.

SEC. 19. In all adjoining buildings hereafter erected, the floor-timbers,

Brick-work between floor-timbers.

built into the same party-wall from opposite sides, shall have not less than four inches bearing, and shall be separated by not less than four inches of solid brick-work.

SEC. 20. Exterior walls, faced with stone, shall have a backing of not less than nine inches of hard brick-work, laid in lime or cement mortar. The stone facing of a wall shall always be securely tied to the brick backing by suitable iron clamps. All brick facings must be securely tied to the backing.

Brick backing of ashlared walls.

SEC. 21. All buildings hereafter erected shall be roofed with slate, tin, or other non-combustible roofing material, and all buildings with flat roofs or having no dormers shall have a skuttle not less than two by three feet, with a permanent step-ladder or flight of stairs thereto.

Roofing materials.

SEC. 22. All chimneys shall be built of brick, stone, or other fireproof non-conducting material. All brick flues, without reference to the purpose for which they may be originally intended to be used, shall be smoothly plastered inside with good parging mortar from top to bottom, and on the outside between the ceiling joists and rafters. Brick flues not starting from the foundation-walls shall be securely built into the brick-work of the walls to which they are hung, and shall be supported by courses of brick, corbeled out from the main wall by successive projections. In cases where a breast of a chimney shall project more than four inches in any nine-inch wall, or nine inches in a fourteen-inch wall, it shall be started and built on the same line from the foundation, or it shall rest upon a footing of masonry or iron, supported by iron beams having a secure bearing on masonry or iron at either end.

Chimney flues and hearths.

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All flues shall be topped out at least four feet above the roof of the building or buildings to which they belong or adjoin. The brick topping out of chimneys shall not have more than four inches projection unless covered by a cap of stone or iron properly secured. Hearths of fireplaces or grates shall be laid upon trimmer-arches of brick, the centering of which must be struck by bricklayers on completion, or upon bars of iron supporting a bed of two courses of brick-work. All flues and chimneys shall be so constructed that fire will not communicate with the adjacent wood-work; and no wooden joist, rafter, beam, or girder shall therefore be built into any chimney or flue whatever, or shall be placed at a less distance than two inches from the outside of the brick-work of any flue, nor shall any flue be built in any party or division wall, unless the same be more than nine inches thick. In no case shall a nail be driven into the masonry of any flue, nor shall any base, flooring, or roofing, or any other wood-work be placed against any brick or other flues until the same shall be well plastered with plaster of Paris behind such wood-work.

SEC. 23. No tin or other metal flue or flues, pipe or pipes, of a single thickness of metal intended to convey heated air in any building hereafter to be built, altered, or erected, shall be allowed, unless the same be in a wall of brick or stone; in all other cases said flues or pipes shall be so constructed as to have a thickness of not less than one inch of plaster Paris, or its equivalent, between the said pipe or flue, and any timber or wood-work adjoining the frame, otherwise the pipes shall be doubled—that is, two pipes, one inside the other, at least one inch apart, and filled in with non-conducting and non-combustible material.

Tin or other metal flues or pipes.

SEC. 24. No smoke-pipe in any building with wooden or combustible

Smoke-pipes and furnaces.

floors or ceilings shall enter any flue unless it shall be at least 18 inches from either the floors or ceilings; in cases where such pipes pass through stud or wooden partitions, they shall be guarded by either a double collar of metal with at least
6j four inches of air-space and holes for ventilation, or by other means equally secure, and approved by the inspector of buildings. In all cases where furnaces or boilers of any kind are used, the smoke-pipe must be kept at least two feet below beams or ceilings, unless said beams or ceilings are properly protected by a shield or tin-plate suspended above said smoke-pipe with a sufficient space for the free circulation of air above and below said shield, and the smoke-pipe shall in all cases be kept at least eight inches from the beams or ceilings, as aforesaid; and the top of all furnaces set in brick must be covered with brick, slate, or tin-plate, supported by iron bars, and so constructed as to be perfectly tight; said covering to be in addition to, and not less than six inches from, the ordinary covering to the hot-air chamber. If, however, there is not height enough to build a furnace-top at least four inches below the floors, beams, or ceilings, the floor-beams must be trimmed around the furnace; and said covering and the trimmers and headers must be at least four inches from the same. The top of portable furnaces, not set in brick, shall be kept at least one foot below the beams or ceilings, with a shield of tin-plate, made tight, suspended at least two inches below the said beams or ceilings, and extending one foot beyond the top of the furnace on all sides.

Hot-air registers.

SEC. 25. All hot-air registers hereafter placed in the floor of any building shall have an air-space extending all around their register-boxes, which must be guarded by tin on the outside.

Openings for doors and windows.

SEC. 26. All openings for doors and windows in all buildings, except as otherwise provided, shall have a good and sufficient arch of stone or brick, well built and keyed, and with good and sufficient abutments, or a lintel of stone or iron.

On all openings in which the lintel shall be less than the thickness of the wall to be supported, there shall be a good timber lintel on the inside of the other lintel, which shall rest at each end not more than four inches on any wall, and shall have an arch turned over said timber lintel. All arches over openings for ranges shall be supported by iron bars.

Openings with walls above.

6k SEC. 27. Openings of more than ten feet in width and upon which a wall rests, shall be covered with iron beams or girders; if cast, they are to have wrought-iron tie-rods of sufficient strength, well fastened at each end of the beam or girder. All such beams shall have cast-iron shoes on the upper side to answer for the skew-back of a brick or cut-stone arch, which said arch shall always be turned over the same, and the arch shall in no case be less than twelve inches in height by the width of the wall to be supported. Cut-stone or hard brick arches, with two wrought-iron tie-rods of sufficient strength, may be turned over any opening less than thirty feet in width, provided they have skew-backs of cut stone, of cast or wrought iron, with which the bars or tension-rods shall be properly secured.

The above clause is intended to meet cases where the arch has not abutments of sufficient size to resist its thrust.

All lintels of stone fronts, returned over a corner opening, shall be of iron of the full breadth of the wall to be supported, and shall be made safe as above detailed; any support at the corner shall be of brick, cut stone, or iron, and if of iron, it shall be in the shape of a double

column—that is, an outer and inner column—and the inner column shall be of sufficient strength to sustain safely the whole weight, and the outer column shall be made of sufficient size to allow a space of at least one inch between it and the inner column, which space shall be solidly filled with plaster of Paris, or some other non-conducting material which is equally secure.

Drains.

SEC. 28. All buildings hereafter built shall have trapped brick, iron, or tile drains with air-tight joints, with a regular fall to the public sewers, and shall be properly entered therein if the sewer is already constructed, and if not constructed, such connections shall be made whenever such sewer shall be constructed.

SUPPLEMENT TO SEC. 28. In all cases where a sewer connection is made below the level of spring-tides, the house-drains must be provided with self-acting flood-gates of galvanized iron or bronze.

SUPPLEMENT TO SEC. 29. All parties who build within the reach of tide-water shall lay their cellar or basement walls up to the level of spring-tides in cement mortar, and of a thickness to be determined in each individual case by the inspector of buildings; also to lay the ground floors water-tight and proportionably strong, as may be agreed upon with said inspector.

Dwellings upon filled land.

SEC. 29. All dwellings erected upon filled or made land shall have a bed of concrete spread over the cellar-bottom, or shall be paved with brick laid in cement throughout the whole extent of the building.

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Ventilation of water-closets.

SEC. 30. It shall be unlawful to make any water-closet without either an external window or suitable ventilating-flue running into a chimney-flue or through the roof.

Wooden supports for walls prohibited.

SEC. 31. It shall not be lawful for any person or persons to erect, construct, or build any rear wall, or any party or division wall between two or more houses or buildings upon any wooden supports whatever; provided, however, that this shall not be taken to prohibit wooden girders over piazzas, bow-windows, or any opening not exceeding ten feet.

WOODEN STRUCTURES.

Restrictions upon erection of frame buildings.

SEC. 32. Wooden or frame buildings may be erected within the building-limits, designated under these rules, under the following limitations and restrictions, provided that they are not erected or placed within less than twenty-four feet of any house built of brick or other incombustible material, without having first obtained a special permit based upon sufficient reasons; but if such wooden building is intended to be occupied as a blacksmith's or whitesmith's shop, carpenter's shop, factory, a livery stable, or as a stable not used for domestic purposes, it shall not be erected within less than fifty feet of any stone or brick house without special permit as aforesaid: provided, however, that this rule shall not be construed to apply to any piazza, platform, balcony, or bath-room which does not exceed ten feet in width, or any bay or oriel window. Sheds not exceeding twelve feet in height at the peak or highest part thereof, my be erected of wood. Wooden or frame sheds, for storage or other purposes, may be located and constructed upon wharves in such a manner as the inspector of buildings may direct. Privies, not exceeding ten feet square and ten feet high, covered with boards or shingles, may be erected in streets not sewered. But all depositories for ashes shall be built of brick or other fire-proof material without wood in any part thereof. Any sign, of what-

ever material it may be constructed, now erected or that hereafter may be erected, on the top or street front of any building, whenever it may be or may hereafter become rotten or unsafe, shall be taken down and removed on the order of the inspector of buildings.

6m SEC. 33. No wooden building hereafter erected shall exceed the height of two stories up to the flat of the roof.

Height.

SEC. 34. No wooden building to be used for the purpose of a dwelling-house shall be erected in a range of more than forty feet without the intervention of a brick partition-wall at least nine inches in thickness, and said wall shall be carried at least six inches above the roof, whether said roof be flat or pitched.

Brick partition in wooden buildings.

SEC. 35. Any wooden building to be used for other purposes than a dwelling-house shall be subject in construction to such restrictions as the inspector of buildings shall designate in the permit given by him for the erection of said building, and shall not be built at a less distance than ten feet from any wooden dwelling.

Wooden buildings for mechanical and other purposes.

SEC. 36. All wooden buildings shall be built upon proper piers of not less than twelve inches square, or upon posts of locust or cedar; and all these erections shall be properly braced and secured.

Foundation, etc.

SEC. 37. All chimneys in wooden buildings shall be built of brick or other fire-proof non-conducting material. All brick flues shall be smoothly plastered inside with mortar from top to bottom, and outside between the roofing and ceiling joists.

Chimneys and flues.

In no case shall chimneys rest upon any flooring without a footing of masonry or iron supported by iron bars having a secure bearing on masonry or iron at either end. All flues shall be topped out at least four feet above the roof of the building to which they belong. The brick topping out of chimneys shall not have more than two inches projection, unless covered by a cap of metal or stone properly secured.

SEC. 38. Hearths of fire-places or grates shall be laid upon brick or other trimmer-arches, or upon bars of iron supporting a bed of brick-work.

Hearths.

SEC. 39. No wood-work of any kind shall be placed at a less distance than one inch from the outside brick-work of any flue. In no case shall a nail be driven into the masonry of any flue. No

Wood-work near flues.

6n wood-work shall be placed at a less distance than one inch from any tin or other metal flue or flues, pipe or pipes, used, or intended to be used, to convey heated air in any building, unless such flues or pipes be cased with metal, leaving a free circulation of air all around the same.

SEC. 40. No smoke-pipe in any such wooden or frame building shall hereafter enter any flue unless the said pipe shall be at least twelve (12) inches from the floors or ceilings; and in all cases where the smoke-pipes pass through stud or wooden partition of any kind, whether the same be plastered or not, they shall be guarded by either a double column of metal, with at least an inch of air-space and holes for ventilation, or its equivalent.

Smoke-pipes in frame buildings.

SEC. 41. Every wooden building constructed contrary to the terms of this ordinance which may hereafter be damaged by fire or otherwise to an amount not greater than one-half the value thereof, exclusive of the value of the foundation, may be repaired or rebuilt; but if such damage shall amount to more than one-half of such value thereof, then such building shall not be repaired or rebuilt,

Repairs to damaged wooden buildings.

but shall be taken down. The amount and extent of such damage by fire or otherwise shall be determined by the inspector of buildings.

Repairs to wooden buildings.

SEC. 42. It shall be lawful for the owner or other party interested to make any necessary repairs upon any wooden or frame building already built, provided that the height of said building to the eaves shall not be increased thereby. It shall also be lawful to substitute for a gravel or pitch roof a flat roof covered with metal or other non-combustible material; but no wooden building now erected, or hereafter to be erected, shall be otherwise raised, roofed, enlarged, or built upon in such a manner that, were such buildings wholly built or constructed under these rules, it would be in violation of any of them.

Prohibition of wooden buildings.

SEC. 43. It shall not be lawful to erect, construct, enlarge, or remove any wooden building anywhere within the ninth, twelfth, thirteenth, and fifteenth electoral districts, nor anywhere in
6o the tenth district north of Pennsylvania avenue; nor shall such wooden buildings be lawful on both sides of Pennsylvania avenue from First street west to Rock Creek, on both sides of Seventh and Fourteenth streets west from Pennsylvania avenue to Boundary street, and on both sides of K street north from Vermont avenue to Twenty-fifth street west.

Frame back-buildings and stables off the main street are exempt from the operation of this section for the streets enumerated above; and sheds and privies, as specified under twelfth section, all exempt throughout from the operation of this section.

The area embraced in this section shall be duly enlarged whenever the progress of improvements should make it advisable, due legal notice being given thereof previously.

Violations of building-regulations.

SEC. 44. Any person or persons violating any of the provisions of the preceding rules for the erection of wooden buildings shall, upon written notice from the inspector of buildings, served upon him or them personally, or posted conspicuously upon the building erected, or in progress of erection, alteration, or repair, in violation thereof, upon his or their neglect or refusal to alter said building, in conformity with the provisions of this ordinance, for a period of three days from said service or said posting, be liable to a penalty of not less than twenty nor more than fifty dollars, and to a like penalty for every day's continuance thereof.

PARTY-STRUCTURES.

Party-walls.

SEC. 45. In case of party-walls built in part upon adjoining lots, under former or existing authority therefor, one moiety of the charge for the regulation dimensions, or so much thereof as the building-owner shall have occasion to make use of, shall be paid for by him before he shall anyways use or break into the wall, the charge or value thereof to be computed by the inspector of buildings, unless the concerned parties mutally agree upon a person or persons for such purpose.

Insufficient party-walls.

SEC. 46. It shall be the duty of the inspector of buildings, upon the application of any building-owner, or his authorized agent, to examine any or all existing party or division walls; and
6p if deemed and adjudged by him to be defective, out of repair, or otherwise unfit for the purpose of such new buildings about to be erected, such party or division walls shall be made good, repaired, or taken down by the building-owner, as the decision may be, the cost and expense of which repair or removal, together with the expense of the

new wall or walls to be erected in lieu thereof, shall be borne and paid exclusively by him; and he shall also make good all damages occasioned thereby to the adjoining premises, or to the internal finishings thereof; but if in such case the building-owner prefers to build an independent new wall of his own by the side of the old party-wall, he shall be relieved from re-imbursing the adjoining owner for former outlay in building the party-wall.

Foundations of party-walls.

SEC. 47. The foundations of any party-walls erected hereafter which shall be laid not less than five feet below grade, on a good solid bottom, or on artificial means, preventing the walls from settling, shall be considered as legal structures; and any building-owner who will excavate to a greater depth must, besides bearing the cost of necessary underpinning, protect the adjoining owner from all injury in consequence of such excavation, be it by cracks in the wall, settling, or otherwise.

Party-fences.

SEC. 48. All partition or party fences shall be kept in good and sufficient repair by the proprietors of the ground on each side at their joint expense; provided, the ground on each side shall be inclosed, used, or occupied; and if any person whose duty it shall be to make or keep in good repair any fence or part of a fence shall refuse or neglect so to do for five days after request being made by the other party interested, or his agent, then it shall be lawful for the party so making request, as aforesaid, to make or repair the whole fence or part of a fence, and to recover one-half of the expense thereof from the person so refusing or neglecting: Provided, also, That no fence erected under the authority of this act shall be less than five nor more than seven feet in height, except by the consent of the parties interested on both sides of such fence, and that the expense of making such fence shall not exceed the market-value of a plain substantial structure of the kind.

6q SEC. 49. If any person shall inclose ground adjoining to that already inclosed, whereby he, she, or they shall be benefited by any fence before erected, the person so benefited shall pay therefor a just and reasonable compensation, regard being had to the condition of the fence at the time.

DANGEROUS STRUCTURES.

Dangerous structures.

SEC. 50. It shall be the duty of the inspector of buildings to inspect all buildings or parts of buildings, stagings, or other structures being dangerous or unsafe on his own observation, on the written request of any two citizens, or upon being notified by any officer of the Metropolitan police, and if the same be insufficient and dangerous, he shall cause a description of such structure, with street and number, to be entered in the books of his department.

Notice to owner.

SEC. 51. The inspector of buildings shall immediately serve a notice in writing upon the owner, agent, or other party having interest in the said structure, requiring the same to be made safe and secure, or removed, as may be deemed necessary; provided that, except in cases demanding immediate attention, the interested parties may appeal within forty-eight hours by writing to the board of public works, and if the decision of said board shall be against the sufficiency of such walls or structures, the owner thereof shall forthwith comply with the decision given. Upon the refusal or neglect of the owner, or other interested party, the inspector of buildings may cause such unsafe or dangerous structure to be taken down, or otherwise made safe, and the cost and

charges shall become a lien upon the said estate, to be collected according to law.

Hoist-ways.

SEC. 52. The lessee or occupant of any warehouse, store, manufactory, or other buildings in which there are hoist-ways or other openings, besides the usual stair-ways, shall cause the same to be securely protected by railings, or such other appliances as may be deemed necessary in special cases by the inspector of buildings.

Steam-engines.

SEC. 53. No steam-engines shall be erected within the above-described building-limits without a special permit obtained from the board of public works, which will be issued or refused after the inspector of buildings has reported thereon.

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TENEMENT AND LODGING HOUSES.

Tenement and lodging houses.

SEC. 54. The inspector of buildings shall examine and approve the plans of any house, building, or portion thereof, intended to be used, occupied, rented, or leased as a tenement or lodging house, before the erection is commenced.

RESTRICTIONS AS TO DWELLINGS AND ROOMS FOR HUMAN HABITATION.

Restrictions as to dwellings and rooms for human habitation.

SEC. 55. No dwelling whatever shall be constructed havings windows on one side only; and no room intended for human habitation or sleeping shall have less than eight feet clear height.

PUBLIC HALLS, ETC.

Inspection of plans of halls, &c.

SEC. 56. The inspector of buildings shall not give a permit for the erection of any building to be used for public assemblies until he has carefully examined the plans and specifications thereof, and ascertained that the plans conform to the requirements of these regulations. A copy of said specification shall be deposited in the office of said inspector.

Arrangements of doors, stair-ways, seats, and aisles in buildings of a public character.

SEC. 57. In all buildings of a public character, already erected or hereafter to be built, such as public halls and places of amusement or instruction, the doors shall open outwards, the hall-doors, stair-way, seats, and aisles shall be so arranged as to facilitate egress in cases of fire or accident, and to afford the requisite and proper accommodation for the public protection in such cases. And all aisles and passage-ways in said buildings, devoted to purposes of amusement or instruction, shall be kept free from camp-stools, chairs, sofas, and other obstructions during any service, exhibition, lecture, performance, concert, ball, or any public assemblage, and the inspector of buildings may, at any time, serve a written or printed notice on the owner, lessee, or manager of any of said buildings, directing any act or thing to be done in or about the arrangements of said buildings, and the several appliances therewith connected, such as halls, doors, stairs, windows, seats, aisles, and escapes, so as to afford the greatest pos-

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sible security and good ventilation to the public and the uses to which they may be severally applied.

Water-attachments.

SEC. 58. The owners and lessees of theatres and public places of amusement are required, during the time said places are opened to the public, to keep attached to a plug or water-attachment, to be furnished by them for that purpose, sufficient hose of the size used by the fire-department of Washington and Georgetown, to extend to the furthest limits of said place of amusement, and said

hose shall be kept at all times in good order and repair, and ready for immediate use.

Violation of preceding rules.

SEC. 59. For any neglect or violation of the provisions of the 56th, 57th, and 58th sections of these rules, a penalty of one hundred dollars shall be imposed upon the owner, lessee, or other occupant of said places.

Power to pass upon the manner of construction.

SEC. 60. The inspector of buildings named under these rules shall have full power in passing upon any question relative to the mode, manner of construction, or material to be used in the erection, alteration, or repair of any building within the above determined building-limit, where the same is not specially provided for herein, to make the same conform to the true intent, meaning, and spirit of the several provisions hereof; and shall also have discretionary power, upon application therefor, to modify or vary any of the several provisions of this act, to meet the requirements of special cases, where the same do not conflict with the public safety and the public good, so that substantial justice may be done; but no such deviation shall be permitted except the same shall be entered on the record of said inspector, and a certificate be first issued to the party applying for the same; such certificate to be issued only upon an order first being obtained therefor from the board of public works.

Penalties.

SEC. 61. If any person or persons, as aforesaid, shall fail to have any new building, alteration, or repair constructed or completed as required by these rules, or otherwise fail to comply with their provisions, he or they, so offending, shall pay the sum of not less than fifty dollars nor more than five hundred dollars for each and every offence, and the further sum of one hundred dollars for each and every calendar month that said house or building shall be suffered to remain without the necessary alteration and the procuring of a proper certificate that the concerned building conforms to the requirements of these rules.

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This applies to all cases where no penalty is specially provided for in the preceding sections.

These sums and all other penalties imposed under these rules shall be recoverable as debts are now or hereafter by law recovered. And the board of public works reserve the right in their discretion, good and sufficient cause being shown therefor, to remit any fines or penalties which any person or persons may incur under any of the provisions of this act.

Injunction may be obtained.

SEC. 61. If upon inspection it should appear that the work upon any building is going on in violation of any of the provisions of this ordinance the inspector of buildings shall forthwith notify the owner or owners, contractor or contractors, of such violation; and if after such notice the said parties, or any or either of them, shall proceed in the erection or construction of such building, it shall be lawful, after due notice in writing setting forth the said violation particularly, for the supreme court of the District of Columbia, or the justice thereof holding the equity court of said District, to issue forthwith an injunction restraining such person or persons from further progress in said work until the facts of the case have been investigated and determined. And if it shall appear to the said court upon such investigation that such building does not in all respects conform to the provisions of this ordinance, said court, besides enforcing the penalty hereinbefore designated, shall issue an injunction to restrain the continuance of the work and to remove so much of the said building as may be decreed by the court within such time as the court may appoint.

MISCELLANEOUS.

SEC. 63. No blacksmiths or whitesmiths' shop, machine-shop, or steam saw-mill shall be erected within thirty feet of any dwelling-house, nor shall any such shop now erected be extended, under a penalty of not less than two or more than five dollars for every day such erection or extension shall remain after notice shall be given by the inspector of buildings for the removal thereof.

Blacksmiths and whitesmiths' shop.

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SEC. 64. It shall not be lawful for any person or persons to establish, lay off, or conduct any brick-yard, brick-kiln, pottery-furnace, or any slaughter-house, or any soap or candle manufactory, bone-boiling, or other establishment, whereby offensive odors are generated, to the detriment or injury of the neighborhood, upon any rear site or upon any site not used as aforesaid within the period of twelve months, within one hundred and fifty yards of any dwelling-house occupied or used within the designated building-limits, unless the person or persons desiring to establish, lay off, or conduct any of the enumerated establishments shall first file with the inspector of buildings the written consent of two-thirds of the owners and occupants of houses within said one hundred and fifty yards, and the said inspector shall, after due examination, approve of it. Any violation of this rule shall be punishable with a fine of not less than ten or more than twenty dollars for every day the violation of this rule is continued.

Brick-yards, &c.

SEC. 65. And it shall not be lawful for any person or persons to establish or locate any coal-yard, lumber-yard, or wood-yard upon any new site or any site not used as such for a period of six months, within fifty feet of any dwelling-house, unless the person or persons desiring to establish or locate any such establishment shall first file, with the inspector of buildings, the written consent of the owner or owners, occupant or occupants, of each and every house, within fifty feet of the ground which is contemplated to be occupied. Violations of this rule shall be punishable with a fine of not less than five nor more than ten dollars for every day he, she, or they shall continue to violate the same.

Coal and wood yards.

SEC. 66. All building-regulations of the late corporations of Washington and Georgetown, whenever they conflict or are inconsistent with these rules, are hereby repealed.

Repeal of former acts.

6v We certify that on the 19th of August, 1872, the foregoing building-regulations were adopted by us for the District of Columbia.

HENRY D. COOKE.
ALEX. R. SHEPHERD.
A. B. MULLETT.
S. P. BROWN.
JA'S A. MAGRUDER.

Attest:
CHA'S S. JOHNSON,
Assistant Secretary.

7 *Exhibit B to O. bill.—Filed Jan.* 2, 1873.

BOARD OF PUBLIC WORKS, DISTRICT OF COLUMBIA,
OFFICE OF INSPECTOR OF BUILDINGS,
Washington, Nov. 22nd, 1872.

F. DAINESE, Esq., *National Hotel, Washington, D. C.:*

SIR: The enclosed note has been sent to you on Oct. 26th, 1872, and you have not taken notice of it. I therefore give you hereby official

notice that your frame-buildings, now in course of erection, on south C str., bet. 6 & 7 str's east, are in violation of the building-regulations [now] in force in this city, and to the observance of which you were held by the permit given you. Your buildings do not come within the rules prescribed for frame-buildings; they are of insufficient material and dangerous to the community; as such they must be removed immediately, or I shall be compelled to have the same taken down at once, at your cost and expense, as directed by law.

ADOLF CLUSS, B. P. W.,
Sup't of Buildings.

8 BOARD OF PUBLIC WORKS, DISTRICT OF COLUMBIA,
OFFICE OF INSPECTOR OF BUILDINGS,
Washington, D. C., Oct. 26th, 1872.

F. DAINESE, Esq., *National Hotel, Washington, D. C.:*

SIR: The board of health protests to this office against the frame-buildings which you have undertaken to erect, of altogether insufficient material, on South C st., between 6 & 7 st's east. I have personally given notice to the master-workman on the spot, under date of Oct. 19th, in the presence of a responsible citizen, that these structures are objected to by this department. Now I repeat this formally to you, so as to avoid further trouble.

Very respectfully,

ADOLF CLUSS,
Sup't of Buildings.

9 *Exhibit C to O. bill.—Filed Jan. 2,* 1873.

DISTRICT OF COLUMBIA, BOARD OF HEALTH,
OFFICE OF THE HEALTH OFFICER,
Washington, D. C., Oct. 22d, 1872.

To the hon. board of public works, Washington, D. C.:

GENTLEMEN: Your attention is respectfully invited to the dangerous manner in which the buildings now being erected by Henry De Naisay, on C st., bet. 6 & 7 st's S. E., are constructed. The lumber is old and decayed, and is being put together, three stories high, without mortising, and is objected to by the citizens in the vicinity.

Very respectfully, your ob't serv't,

T. S. VERDI,
Health Officer.

10 *Exhibit D to O. bill.—Filed Jan. 2d,* 1873.

WASHINGTON, *Dec. 20th,* 1872.

This is to certify that I have, at the request of Mr. A. Cluss, superintendent of buildings, made an examination of the block of buildings of four frame-house', in the course of erection on C st., bet. 6th & 7th, N. E., and belonging to F. Dainese, esq. I find that they are constructed in most part of unsound timber, and put togeth' in a very insecure manner, and I am of the opinion that they are liable to give way, from bad construction and inferior material, at any time, and totally unfit to resist a heavy wind-storme.

Very respectfully,

THO'S B. ENTWISLE.

Sworn and subscribed to before me this 21st day of Dec., A. D. 1872.
T. DRURY, *J. P.*

11 [No. 891.]

BOARD OF PUBLIC WORKS D. C.,
OFFICE OF INSPECTOR OF BUILDINGS,
Washington, Sept. 18th, 1872.

F. Dainese is hereby permitted to erect on a lot situated on the south side of C street, between 6 & 7 streets, southeast, about 75 feet from corner of 7th street, four frame-buildings, 15 feet in front, and 50 feet in depth, 3 stories high, having a shingle roof, and having a back building of by feet in size, and stor high. Said building to be arranged for dwellings, to be heated by stoves, and to be constructed in conformity with existing building-regulations as amended by board of public works.

ADOLF CLUSS,
Inspector of Buildings.

Satisfactory evidence having been given that the contract was made prior to the enforcement of the "building-regulations," August 24, 1872.

12 WASHINGTON, *Dec.* 30, 1872.

ADOLF CLUSS, Esq.:

DEAR SIR: Abreeably to your request, I have examined the miserable apology for a frame-building owned by Francis Dainese, on C street, between 6 & 7 streets, southeast, and pronounce it unsafe and dangerous, and such a building as I would not insure, and such a building should not be built as a human habitation.

CHARLES F. WOOD,
Builder and Inspector for the National Union Ins. Co.

Ssubscribed and sworn to before me, a justice of the peace, this 3rd day of January, 1873.

[L. S.] WM. MARTIN, *J. P.*

13 *Restraining order.—Filed Dec.* 31, 1872.

The prayer for injunction in this case will be heard before me, at the city hall, on Saturday next, the 4th January, 1873, at 11 o'clock a. m.

Dec. 31st, 1872.

In the mean time the defendants are restrained as prayed.

Dec. 31st, 1872.

A. WYLIE, *Justice.*

Temporary injunction.—Issued Dec. 31, 1872.

An original bill praying for an injunct. is this day filed. Hearing fixed for 4th day of January, 1873, at 11 o'clock a. m. Until further order, you are hereby restrained as prayed.

By order of the court.

A. WYLIE, *Justice, &c.*

1873, JAN'Y 2.

Attest:

R. J. MEIGS, *Clerk,*
By L. P. WILLIAMS, *Asst. Clerk, &c.*

14 *Summons to answer.—Issued Ja'y 2, 1873.*

In the supreme court of the District of Columbia, Jan'y 2d, 187

BOARD OF PUBLIC WORKS, COMPLAINANT,
against
FRANCIS DAINESE ET AL., DEFENDANT. } No. 3035. Equity doc

The President of the United States to Francis Dainese, defendant:

You are hereby commanded to appear in this court at its first spec term, occurring twenty days after service of this subpœna, and answ the exigency of the bill, under pain of attachment, and such other pr ess of contempt as the court shall award.

Witness D. K. Cartter, chief justice.

R. J. MEIGS, *Clerk*,
By L. P. WILLIAMS, *Asst. Clerk.*

MEMORANDUM.—That the defendant is to enter his appearance in th suit in the clerk's office, on or before the special term to which this wr is returnable, otherwise the bill may be taken for confessed.

Marshal's return.

15 Summoned both, & served copy of notice for injunction o both.

A. SHARP, *Marshal.*

JAN'Y 3D, 1873.

Ans. of Wesley Frey.—Filed Jan. 6, 1873.—R. J. MEIGS, *Clerk.*

In the supreme court of the District of Columbia.

BOARD OF PUBLIC WORKS
vs.
DAINESE & FREY. } Equity 3035. Docket 12.

The separate answer of Wesley Frey to the bill of complaint agains him and others in equity exhibited.

This defendant, for answer to the said bill, or so much thereof as h is advised it is necessary for him to answer, says:

1st. He admits the allegations contained in the 1st, 2d, & 3rd para graph of plaintiff's bill.

16 2d. In answer to the 4th paragraph, this defendant states tha he is now erecting for Mr. F. Dainese a building to comprise fou separate houses of the dimensions stated; but denies that the mode o construction is dangerous and improper, and such as should not exis in said city. He further states that before commencing the construc tion of said buildings, he applied to Adolph Cluss, the superintendant o buildings under the board of public works, and, upon full knowledge and examination of the contract entered into between this defendant and F. Dainese, the said Adolph Cluss granted the permits, (a copy, certified, is now on file in a suit now pending in this honorable court, wherein F. Dainese is complainant and the board of public works are defendants, being equity cause No. 2993. He avers that the building is being constructed in strict accordance with said contract and permits.

Sworn and subs

He denies that the buildings are unsound or dangerous, or that
17 the lumber used therein is rotten or unsound.

He denies that the construction of said buildings will work irreparable injury; and he refers to the affidavits of Solomon J. Fague, L. S. Chapman, Chas. G. Walker, and others, on file in said cause No. 2993, and prays that they may be read as part of this answer.

He states further that, during the time that he was at work on said buildings, Mr. Adolph Cluss called and advised him to stop work, which he declined to do; and at one time the said Cluss distinctly told this defendant that if he had built the houses only 2 stories high he would not have found any fault with them.

He further states that he has examined a row of buildings on the corner of 9th st. east and H street north, which he is informed is being erected for Mr. A. R. Shepherd, and found them spiked together
18 the same as the buildings now erected by him. One of the said houses blew down during the recent wind-storms, while the houses I am erecting for Mr. Dainese were unhurt. I found the buildings on the corner of 9th & H sts. to consist of lumber 2×4, and the sills, as far as I could learn, 4×6, whilst the buildings I am erecting for Mr. Dainese more are twice that size.

JOHN A. OLIVER, *Solicitor.*

Wesley Frey, being duly sworn, deposes and states that he has heard read the foregoing answer, and the statements therein contained, so far as they are stated of his own knowled. are true, and those stated on the information of others he believes to be true.

WESLEY his + mark. FREY.

Subscribed and mark made this 6th day of January, 1873.

R. J. MEIGS, *Clerk*,
R. J. MEIGS, JR., *Ass't.*

19 *Answer of F. Dainese.—Filed Jan'y 7, 18'3.*

In the supreme court of the District of Columbia.

BOARD OF PUBLIC WORKS
vs.
FRANCIS DAINESE, WESLEY FREY. } Equity No. 3035. Docket No. 12.

The answer of Frances Dainese to the bill of complaint in the above entitled cause, or so much thereof as he is advised it is necessary he should answer, answering saith:

1st. I admit the allegations contained in the 1st, 2, & 3d paragraph of said bill, except that I deny that the building-regulations made by said board were promulgated on the 19th day of August, 1872, but aver that while they bear date on that day they were not published and promulgated until the 7th day of September, 1872.

2d. On the 26th day of August, 1872, I entered into a contract with my codefendant, Wesley Frey, for the erection of a block of four frame-
20 houses on lot 11, in square 873, on C street, between 6 & 7 streets east, which houses were to be 15 feet front by 50 feet deep, and three stories high. That when the permit was applied for Adolph Cluss, inspector of buildings, refused to grant it, but upon seeing the contract and specifications, which he, said Cluss, read over in my presence, he

granted the permit, a copy of which, duly certified, is on file in cause No. 2993, now pending in this honorable court, and to which I beg to refer and make a part of this answer. I also beg leave to refer to my petition filed in said cause No. 2993, and make the same a part of this answer.

3d. I also state that, since the *serving* out of the restraining order in said cause No. 2993, the buildings have been weather-boarded and roofed, and a large additional expense incurred in materials to be put in said buildings.

4th. That I have frequently visited and inspected said buildings, and aver that the same are being constructed in strict accordance with
21 said contract and specifications; and I further aver that all statements to the contrary are untrue and false.

5th. I deny that the said buildings are being constructed of unsound and rotten lumber, and pronounce any statement to that effect untrue and false. On the contrary, I aver that the lumber is partly new and partly second-hand, but is better and stronger than that ordinarily used in frame-buildings made wholly of new lumber; & I deny that their construction will work irreparable injury, but aver that the continuance of the injunction will work irreparable injury to me. There are no buildings on said square east, and none within a hundred feet to the south of said buildings, and the nearest building on the west is a frame-church owned by a colored congregation; and the affidavits of John Pryor, the guardian and custodian, filed herewith, is referred to in refutation of the charge that the building is complained of by the neighbors.

22 6th. I aver that the mode of construction of said building is such as is now used in this city in numerous buildings that have come under my observation; that the second-hand lumber used therein is lumber which was sold by the United States, and that I have put up houses with the same kind of lumber and constructed in the same manner as this, all of which have stood and been inhabited for the last six and eight years, and are now stronger than houses built of new lumber now standing in this vicinity which were tenoned.

7th. I aver that, since the said buildings have been in course of construction, tremendous wind-storms have prevailed, particularly on the 9th and 10th days of December, 1872, and, notwithstanding their severity, these buildings were not only not blown down, but left entirely uninjured. At the time of said wind-storms the houses were open
23 and the wind could have full force upon them and in them, more than it possibly can when finished, while one of a row of frame houses on H street, corner of Ninth st. east, which are no doubt being constructed under the superintendence of said Adolph Cluss, and of new lumber, was demolished.

8th. I further aver that I believe this effort on the part of the said Adolph Cluss and the board of public works to interfere with said building after he, said Cluss, had given his permit to erect the same, is prompted by spite and personal enmity.

I deny that the said buildings are composed in whole or in part of rotten or unsound lumber, or that the mode of construction is dangerous to the community.

9th. I beg leave to refer to the affidavits of Solomon J. Fague, Chas. E. Hulse, Samuel Thornton, and John Prior, filed herewith, and
24 also to the affidavits of Solomon J. Fague, Charles G. Walker, L. S. Chapman, L't M. A Austin, of the metropolitan police force, Alfred Short, Lemuel Henson, Nicholas Frey, Nicholas Taylor, Patrick Stewart, Basil Frazer, and Alfred Johnson, filed in said cause No. 2993.

And having fully answered, I ask that the temporary restraining order granted on the 31st December, 1872, be dismissed, and that I may be hence dismissed with my costs, and, as in duty bound, will every pray, &c.

JOHN A. OLIVER,
Solicitor for Def't.

On this day of January, A. D. 1873, personally appeared before me Francis Dainese, who, being sworn according to law, states that he has read the foregoing answer, and that the matters stated therein as of his own knowledge are true, and those stated upon information of others he believes to be true.

F. DAINESE.

25 Sworn and subscribed before me this 7th day of January, A. D. 1873.

SAM'L C. MILLS, *J. P.* [SEAL.]

Aff't of Solomon J. Fague.—Filed Jan. 7, 1873.

WASHINGTON, D. C., *January* 6, 1873.

MR. F. DAINESE:

DEAR SIR: You asked my opinion as to the strength of building formed by tenon and those formed by spiking to sills. I am in favor of the tenon myself, but a great many contend that nailing is as strong, when properly executed. The buildings I examined on C street, between 6th & 7th streets east, have large spikes nailed into heavy sills, which, in my opinion, are as strong if not stronger than the common tenon put in frame-buildings about Washington City. The blowing down of one on H street during the heavy storm of wind that prevailed in the city, and these withstanding the same storm, is only another proof that
26 my views are correct.

Yours, respectfully,

SOLOMON J. FAGUE.

Sworn to and subscribed before me this 7th day of January, A. D. 1873.

R. A. HYDE,
Justice of the Peace.

Aff't of John Prior.—Filed Jan. 7, 1873.

In the supreme court of the District of Columbia.

BOARD OF PUBLIC WORKS
vs.
FRANCIS DAINESE, WESLEY FREY. } No. 3035. Docket, No. 12.

JOHN PRIOR, being sworn according to law, states that he is the custodian and in charge of the Enon Church on C street, between 6th & 7th streets, which is the nearest building to the building now being erected by Wesley Frey for F. Dainese, and that I have watched the construction of the said building ever since its commencement, and believe
27 the same solidly built, and not dangerous to the community. I live in the church, and am the nearest neighbor, there being no houses to the east of said building on said square, and none nearer than 100 feet to the south, and I have no objection to said houses, and do not

believe they will endanger the life or limb of any persons who may occupy them after they are finished, or of the buildings falling on the church.

his
JOHN + PRYOR.
mark.

Sworn and subscribed before me this 6th day of January, 1873.
B. W. FERGUSON, *J. P.*

Aff't of Sam'l Thornton.—Filed Jan'y 7, 1873.

In the supreme court of the District of Columbia.

BOARD OF PUBLIC WORKS
vs.
FRANCIS DAINESE, WESLEY FREY. } No. 3035. Equity doc., 12.

28 SAMUEL THORNTON, being sworn according to law, states that eight years ago he erected for Mr. F. Dainese, on lot 14, in square 140, on 19th street, between L & M, a block of buildings, of lumber taken from the same place as that now being used by Wesley Frey in the construction of a block of houses for said Dainese on C st., between 6th & 7th sts., southeast. That he built said block by spikes instead of tenons, and it has withstood all the weather and ravages of time so far, and I consider them stronger than if built by tenons. The lumber used on the block now being erected by said Frey is sound and well seasoned, and stronger than new lumber, and is the same kind of lumber I used in the construction of the block mentioned. All of it was bought from the U. S. Government, and is difficult to work because it is full of nails and tough, but I regard it as better and stronger than new lumber, because it is well
29 seasoned. I further say that the block in question covered four houses, and was recently raised at once fourteen feet from the ground, and no timbers gave way, although they were not tenoned. I have been a resident of this city for ten years, and a practical carpenter and builder for the last sixteen years, and can find no fault whatever with the said building on C street south, between 6th & 7th, whether as regards the soundness of its lumber or its solidity and safety.

his
SAM'L + THORNTON.
mark.

Witness:
F. W. JONES.

Subscribed and sworn to before me this 6th day of January, A. D. 1873.
SAM'L C. MILLS, *J. P.* [SEAL.]

Aff't of Charles E. Hulse.—Filed Jan. 7, 1873.

In the supreme court of the District of Columbia.

BOARD OF PUBLIC WORKS
against
FRANCIS DAINESE, WESLEY FREY. } No. 3035. Equity doc. 12.

30 CHARLES E. HULSE, being sworn according to law, states that he is a resident of Washington City, D. C., and has been so for 23

years; that he has examined the building now being erected by Wesley Frey for Francis Dainese on C street, between 6th & and 7th sts., southeast, in said city, and found the lumber well seasoned, and much larger and stronger than lumber gener'ly used in the construction of new frame houses. There is none of it rotten or unsound. Affiant has himself had built a number of frame-houses, and considers those mentioned and referred as strong in every respect as any he has seen built. The lumber is, a part of it, second-hand, but twice as large as that usually used. The timbers, instead of being morticed, are joined by 6-inch spik's, which makes them much stronger than if mortised; and, in my opinion, the spikes will last ten times longer than a mortice. The
31 building is perfectly safe, and resisted the terrible storms of the 9th & 10th of December, 1872, whilst some other buildings, erected of new lumber, were blown down. The building, being yet in an unfinished state, will be greatly strengthened when the remaining timbers are put in. Builders generally object to using old or second-hand lumber, because it has nails in it, and is much harder to work than new; but I am of the opinion that it is much stronger and will resist more than new lumber, because it is well seasoned. These are facts of which I am certain, being myself a practical builder of brick and frame houses, having built, within the last year, upwards of twenty houses in this city, and any objection as to the safety of these particular buildings of Mr. Dainese, now in course of construction on the south side of C street, between 6th & 7th streets, southeast, are visionary, and entirely without cause of any kind.

CHARLES E. HULSE.

32 Sworn and subscribed before me this 6th day of Jan'y, 1873.
B. W. FERGUSON, *J. P.*

Cert. of A. B. Mullett.—Filed Jan. 7, 1873.

TREASURY DEPARTMENT,
OFFICE OF SUPERVISING ARCHITECT,
December 24th, 1872.

I hereby certify that I have, in accordance with the request of Adolf Cluss, inspector of buildings in this city, visited and inspected the wooden structures now in course of erection on C street, between 6th and 7th streets, in the city of Washington, District of Columbia. I find them composed of unsuitable material; much of it being absolutely rotten, and none of it sound. The structur' exhibits no signs of mechanical skill, and would be unsafe and unsuitable for occupancy,
33 even if constructed of new lumber. The wind has driven them out of the perpendicular, though now supported by temporary braces of lumber, to be removed on the completion of the work. They are unworthy of the name of buildings, and are a disgrace to the city of Washington.

(Signed) A. B. MULLETT,
Consulting Engeneer B. P. W.

Protest of citizens.—Filed Jan. 7th, 1873.

WASHINGTON, D. C., *January* 4th, 1873.

To the supreme court of the District of Columbia, sitting as a court of equity:

The undersigned, property-holders in the eastern section of the city, respectfully pray that your honorable body will sustain the board of

public works in its endeavor to remove a large frame building in process of erection on C street, between 6th & 7th sts., s. east. Said building is pronounced by competent judges unsafe, dangerous to the
34 neighborhood on account of fire, and is an eyesore to all. It is, in our opinion, such a building as ought not to be erected anywhere within the city limits.

EDMUND F. FRENCH, 600 *N. C. avenue.*
EDWIN HERGESHEIMER, 623 *C st. southeast.*
SAM. CROSS.
JAS. A. TAIT.
LAWRENCE CAVANAUGH.
ANNE C. KNIGHT, *N. C. avenue.*
J. W. BOGGS, 624 *N. C. ave.*
M. M. RICHARDSON, 630 *N. C. avenue.*
W. P. ALLEN.
JOHN HITZ, *Cor. 6th st. east & Pa. ave.*
WM. B. MOORE, 126 11*th st. s. e.*
JAMES C. DULIN.
GEORGE T. GULICK.
F. HITZ.
PETER MCNAMARA.
J. G. KIMBALL, 620 *N. C. ave.*
E. C. MERRICK, 626 *North Carolina avenue.*

35 DISTRICT OF COLUMBIA, *County of Washington, ss:*

Personally appeared before me the above-named Edmund F. French, to me well known, and acknowledged his signature hereunto attached.

Given under my hand and notarial seal this 7th day of January, A. D. 1873.

J. G. KIMBALL,
Notary Public.

Protest of trustees pub. school.—Filed Jan. 7, 1873.

To the judges of the supreme court of the District of Columbia:

The undersigned, trustees of the public school' of Washington, beg leave to submit to you their protest against the erection and completion of the large wooden structure now in process of building on C street southeast, between 6th & 7th streets, as dangerous to the valuable school-property known as Wallach building, and to the neighborhood in which it is situated, and discreditable to that whole sec-
36 tion of the city.

WM' B. MOORE,
JAMES C. DULIN,
E. F. FRENCH,
W. P. ALLEN,
Trustees 3rd District.

DISTRICT OF COLUMBIA, *County of Washington, ss:*

Personally appeared before me the above-named E. F. French, to me well known, and acknowledged his signature hereto attached.

Given under my hand and notarial this 7th day of January, 1873.

J. G. KIMBALL,
Notary Public.

37 *Request b'd of pub. wk's to chief police, &c.—Filed Jan'y 7, 1873.*

BOARD OF PUBLIC WORKS, DISTRICT OF COLUMBIA,
Washington, Nov. 11, 1872.

Maj. A. C. RICHARDS, *Supt. Met. Police:*

MAJOR: I am directed by the board to transmit to you the enclosed communications from Mr. Adolf Cluss, in reference to the erection, con-

trary to law, by F. Dainese, of certain frame buildings on C st. south, between 6th and 7th st's east, and to request that you will place at his disposal a sufficient number of policemen to enable him to enforce the law in case the owner refuses to remove the buildings as directed by the board.

Very respectfully,
(Signed) CHA'S S. JOHNSON,
Asst. Sec'y.

Official copy: CHA'S S. JOHNSON,
Asst. Sec'y.

38 *Decree.—Filed Jan'y* 11, 1873.

In the supreme court of the District of Columbia.

BOARD OF PUBLIC WORKS *vs.* FRANCIS DAINESE. } 3035. Equity doc. 12.

This cause came on to be heard on bill, answer, and affidavits; the cause was argued by counsel. It is, therefore, this day adjudged, ordered, and decreed that the injunction prayed for in said bill be, and the same is hereby, made permanent.

By the court.

A. WYLIE.

Appeal.—Filed Jan. 11, 1873.

BOARD OF PUBLIC WORKS *vs.* FRANCIS DAINESE. } 3035. Eq. dock. 12.

The defendant prays an appeal from the decree this day rendered.

J. W. OLIVER,
Att'y for Def't.

Appeal entered as prayed.
By the clerk.

Motion to dismiss appeal.—Filed Apr. 22, 1873.

In the supreme court of the District of Columbia. In general term.

BOARD OF PUBLIC WORKS *vs.* DAINESE. } No. 3035. Equity doc. On appeal.

And now, to wit, the appellees in the above-entitled cause, by their attorney, William A. Cook, move the court to dismiss the appeal taken therein because of the appellant's failure to comply with the provisions of the 9th rule of this court.

WILLIAM A. COOK,
Sols. for Def'ts, Compl'ts, and Appellees.

Motion to dismiss appeal overruled by gen. term, Ap'l 26, 1873.

BOARD OF PUBLIC WORKS *vs.* F. DAINESE. } No. 3035. Equity dock. 12.

The complainant's motion to dismiss the defendant's appeal for the cause aforesaid is, upon consideration, overruled.

By order of the court.

40 *Appeal dismissed and re-instated April* 29, 1873.

In the supreme court of the District of Columbia. In general term.

F. DAINESE
ats.
BOARD OF PUBLIC WORKS. } 3035. Equity docket 12.

The motion of Mr. Cook, solicitor for the board of public works, coming on to be heard, it is thereupon ordered that Mr. Dainese's appeal be, and the same is hereby, dismissed. And, upon his motion, said appeal is re-instated; and it is ordered that said cause go to the foot of the calendar.

By order of the court.

Motion by compl't for affirmance of decree.—Filed Apr. 29, 1873.

In the supreme court of the District of Columbia. In general term.

BOARD OF PUBLIC WORKS, APPELLEE,
vs.
DAINESE, APPELLANT. } Equity No. 3035. Calendar No. 24.

I move for judgement in this case in favor of the appellee, because of neglect on the part of the appellant or his solicitor to comply with the 94th rule of this court in relation to appeals before the general
41 term, and especially because, first, no printed abstract of the pleadings was prepared or furnished to the court before the commencement of the term or since, and because no such abstract was furnished to the appellee or his solicitor before commencement of the term, and because three (3) printed copies of the points on which the appellant intends to rely with a reference to authorities to be cited by him was not furnished to the solicitor of the appellee before the commencement of term.

WILLIAM A. COOK,
Solicitor for Appellee.

DISTRICT OF COLUMBIA, *ss:*

Before me, , appeared H. W. B. Brown, who, being sworn according to law, says that he mailed a copy of this notice to Francis Dainese, the appellant, and left copies at the office of John A. Oliver and George P. Fisher, and also mailed copies to them, on the 29th of Ap., 1873. That endorsed on each copy was a notice that
42 the motion would be called up for hearing on Saturday, the 3rd of May, 1873, or sooner, if possible.

H. W. B. BROWN.

Sworn and subscribed the 29th of April, A. D. 1873, before me.
R. J. MEIGS, *Clerk S. C. D. C.*
R. J. MEIGS, JR., *Ass't.*

Decree dismissing bill without prejudice.

In the supreme court of the District of Columbia. In general term.

BOARD OF PUBLIC WORKS
v.
F. DAINESE AND WESLEY FREY. } Eq. No. 3035.

This cause coming on for hearing, it is this 31 day of May, 1873, ordered and decreed that the decree of the court below be affirmed without prejudice.

D. K. CARTTER,
Chief-Justice.

43 *Appeal to Sup. C't U. S.—Jun.* 7, 1873.

In the supreme court of the District of Col'a. In general term.
June 7, 1873.

BOARD OF PUBLIC WORKS
vs.
F. DAINESE. } 3035. Equity docket 12.

The defendant, by his solicitor, comes here now, in open court, and prays an appeal to the Supreme Court of the United States from the decree of this court at the present term, and the same is allowed.

By order of the court.

44 In the supreme court of the District of Columbia, the 9th day of June, 1873.

HENRY D. COOKE ET AL.
vs.
FRANCIS DAINESE & WESLEY FRY. } No. 3035. Equity docket 12.

Know all men by these presents that we, Francis Dainese and Charles V. Gordon, are bound unto the above-named Henry D. Cooke, Alexander R. Shepherd, Samuel P. Brown, James A. Magruder, & Adolf Cluss, composing the board of public works of the District of Columbia, in the sum of five hundred dollars, to be paid to the said Henry D. Cooke, Alexander R. Shepherd, Samuel P. Brown, James A. Magruder, & Adolf Cluss, composing the board of public works, and to their successors in office; to which payment, well and truly to be made, we bind ourselves, and each of us, jointly and severally, and our and each of our heirs, executors, and administrators, firmly by these presents, sealed with our seals, and dated this ninth day of June, 1873.

Whereas the above-named Francis Dainese hath prosecuted an appeal to the Supreme Court of the United States to reverse the decree rendered in the above suit by the said supreme court of the District of Columbia:

Now, therefore, the condition of this obligation is, that if the above-named Francis Dainese shall prosecute his said appeal to effect, and answer all damages and costs if he shall fail to make good his plea, then

this obligation shall be void; otherwise the same shall be and remain in full force and virtue.

F. DAINESE. [SEAL.]
CHA'S V. GORDON. [L. S.]

Sealed and delivered in presence of—
R. J. MEIGS.
Approved. Oct. 7th, 1873.

D. K. CARTTER,
Chief-Justice.

45 DISTRICT OF COLUMBIA, *to wit:*

I, R. J. Meigs, clerk of the supreme court for said District, do hereby certify that the foregoing 44 pages are truly copied from the originals on file and of record in the clerk's office of said court, and that said originals constitute the entire record in a cause pending and lately decided in said court, entitled Henry D. Cooke et al. vs. Francis Dainese et al. 3035. Equity docket 12.

Witness my hand and the seal of said court this 7th day of October, A. D. 1873.

[SEAL.] R. J. MEIGS, *Clerk.*

(Indorsement on cover:) No. 249. Francis Dainese, appellant, vs. the Board of Public Works of the District of Columbia, consisting of Henry D. Cooke, Alexander R. Shepherd, et al. District of Columbia sup' c't. Filed 14th October, 1873.

Supreme Court of the United States.

No. 249.

FRANCIS DAINESE, APPELLANT,

vs.

THE BOARD OF PUBLIC WORKS OF THE DISTRICT OF COLUMBIA.

Appeal from the Supreme Court of the District of Columbia.

Brief and Argument of Appellant.

F. P. CUPPY and JOHN W. ROSS,
Solicitors for Appellant.

WASHINGTON, D. C.:
Printed by W. H. Moore, 511 Eleventh street.
1875.

Supreme Court of the United States.

No. 249.

FRANCIS DAINESE, APPELLANT,

vs.

THE BOARD OF PUBLIC WORKS OF THE DISTRICT OF COLUMBIA.

Appeal from the Supreme Court of the District of Columbia.

Brief and Argument of Appellant.

Statement of the Case.

On the 2d day of January, 1872, the Board of Public Works filed a bill against Francis Dainese and Wesley Frey, praying an injunction to prevent the further construction of a block of buildings then in course of erection by Frey, the contractor for Dainese, in Washington. The bill alleges, (p. 1,) that among other duties devolved upon the plaintiffs by act of Congress is that of making regulations in relation to the construction of buildings in said District—cites certain building regulations adopted by them—and states that Adolf Cluss was appointed Superintendent of buildings and charged with their immediate enforcement. The 4th section of the bill alleges that Dainese is the owner of a certain lot of ground, on which he is engaged in erecting a block of houses under a contract with Frey. That the mode of construction is dangerous and improper, that said buildings were being constructed in violation of certain building regulations; that defendant had been notified by Cluss that the buildings were of insufficient material and dangerous to the community, and in violation of said regulations, and that they must be removed; or that he (Cluss) would have the same done. The 5th sec. alleges that the defendant refuses to remove the same. The 6th states that the buildings will be of great danger to the community in the vicinity of their location, and be productive of great and irreparable loss. With the bill as Exhibits are the building regulations, (p. 2,) notices from Cluss to Dainese, (pp. 15, 16,)

dated October 26th, and November 22d, 1872, notifying Dainese that the buildings did not come within the rules prescribed for frame buildings—that they were of insufficient material and dangerous, and must be removed; a complaint from Verdi, Health Officer, addressed to the Board, (p. 16,) two certificates, one from Entwisle, (p. 16,) and another from Wood, (p. 17,) as to the unsafe character of the buildings, and a copy of the permit granted for the erection of the block, (p. 17.)

A temporary restraining order appears to have been issued and filed Dec. 31, 1872, (p. 17,) two days before the filing of the bill, Jan'y 2, 1873, (p. 1,) as well as a temporary injunction also bearing date Dec. 31, (p. 17,) and hearing fixed for Jan'y 4th, 1873, (p. 17.) The hearing was not had until January 11, 1873, (p. 25.) On the 6th Jan'y defendant Frey filed his answer, (pp. 18, 19,) admitting the allegations in the first three paragraphs of the bill. To the 4th, he admits that he is engaged in erecting four houses of the dimensions named, but denies that the mode of construction is improper, or such as should not exist in the city. That before commencing the construction of said block he applied to Cluss, Supt. of Buildings, who granted the permit upon full knowledge and examination of the contract between Frey and Dainese. He avers that the buildings are being constructed in strict accordance with the contract and the permit; denies that the buildings are unsound or dangerous, or that the lumber used therein is rotten or unsound; denies that the construction of the buildings will work irreparable injury, and refers to, and makes part of his answer, the affidavits filed in Equity cause No. 2,993, of Dainese vs. The Board of Public Works, (No. 250 on this docket,) and prays they may be taken as part of his answer. He states that at one time Cluss told him that *if he had built the houses only two stories high he would not have found any fault with them.* He alleges that a block in course of erection for A. R. Shepherd, as he is informed, has been examined by him, and found to be built with spikes, the same as the block of Dainese, but that the timbers in the Shepherd block were but half as large as those used in Dainese' block; that Dainese' block stood uninjured in a recent wind storm which blew down one of the Shepherd houses.

Dainese' answer was filed Jan'y 7, 1873, (p. 19) He admits the first three paragraphs of the bill, but denies that the building regulations were published prior to Sept. 7, '72. That he made the contract with Frey Aug. 26, 1872, for the block to be three stories in height. That upon applying for the permit Cluss refused at first to grant it, but having read over the contract and specifications in Dainese's presence he granted the permit. Reference is made to the petition in Equity cause No. 2,993, which is made part of his answer. That the block had been weather boarded and roofed and large additional expense incurred thereon. That the

building is in strict accordance with the contract and specifications; denies that the material is unsound; alleges that it is partly new and partly second-hand, and that it is better and stronger than that ordinarily used in frame buildings made wholly of new lumber. Denies that the construction of the block will work irreparable injury, but alleges that continuance of the injunction will work irreparable injury to him. That there are no buildings on that square east, and none within 100 feet south; that the nearest building west is a frame church, and refers to the affidavit of Prior, (p. 21) custodian of the church, in denial of the charge that the building is complained of by the neighbors. The 4th paragraph of the answer alleges that the mode of construction used is usual in the city, and that buildings constructed of the same kind of material and in the same manner have been occupied six and eight years, and are still stronger than buildings which were tenoned; that the block had withstood several wind storms, although unfinished, while other buildings of new lumber had fallen. Avers that the effort to interfere with the buildings is prompted by spite and personal enmity; denies that the material in whole or in part is unsound, or the mode of construction dangerous to the community, and refers to the affidavits of Fague, Hulse, Thornton, and Prior, filed in this cause, and to the eleven affidavits in Equity suit No. 2,993, (No. 250 on the docket of this Court.)

The affidavit of Prior (p. 21,) states that he is the custodian of the church, which is the nearest building to the block in question; that he had watched the construction of the building, and that he believed it solidly built and not dangerous to the community; that he lived in the church, and was the nearest neighbor, there being no house to the east of the block on that square, and none nearer than 100 feet to the south; and that in his belief no danger was imminent to persons occupying the block, or to the church.

The affidavit of Samuel Thornton (p. 22) shows that eight years previously he erected a block for Dainese of lumber taken from the same place the material of this block was taken from. That the block built by affiant covered four houses, and had recently been raised at once 14 feet from the ground, and no timbers gave way although not tenoned. That it was built with spikes instead of tenons, and that he deemed it stronger than if built with tenons. That the lumber used by Frey was sound and well seasoned, and stronger than new lumber; that he had been a practical carpenter and builder for sixteen years, and found no fault with the Frey block as regarded the soundness of the lumber or its solidity or safety.

The affidavit of Hulse, (pp. 22, 23,) shows that he had examined the block and found the lumber well seasoned, and larger and stronger than that generally used. That none of it was rotten or unsound. That the buildings were as strong in every respect as any he had seen; that the lumber was twice as large as that usu-

ally used; that the timbers joined by a six inch spike, were stronger than if mortised; that spikes last ten times longer than mortises. That the block is perfectly safe, and resisted the terrible storms of 9th and 10th Dec., 1872, in which buildings of new lumber were blown down. That the buildings would be still stronger when finished. That secondhand lumber was better than new, because well seasoned. That affiant is a practical builder, having built over 20 houses in the past year, and that objections to the block in question were without cause.

On the part of the Board a certificate from Mullett, consulting Engineer of the Board, (p. 23,) not entitled in the cause and not sworn to, stating that he had examined the block; that the material was unsuitable, much of it rotten and none of it sound. That the structure exhibited no signs of mechanical skill, and would be unsafe and unfit for occupancy if built of new lumber That the wind had driven them out of perpendicular; that they were unworthy the name of buildings and a disgrace to the City of Washington. There were also filed a protest of certain persons, (p. 24,) protesting against the erection and completion of the block, and a request from the Secretary of the Board to the Supt. of Police, dated Nov. 11, 1872, (pp. 24, 25,) requesting a force of policemen to enforce the law in case the owner refused to remove the buildings as directed by the Board.

The case was heard Jan. 11, 1873, on bill, answers and affidavits, (p. 25,) and the injunction was made permanent. On the same day defendant appealed to the General Term, (p. 25,) and on the 31st May, 1873, the decree of the Equity Court was affirmed without prejudice, (p. 27.) An appeal to this Court was taken June 7, 1873,(p. 27.)

ASSIGNMENT OF ERRORS.

The Court erred in affirming the decree of the Special Term making the injunction perpetual.

BRIEF OF APPELLANT.

The equity of the bill being wholly denied by the answer, and disproven by the affidavits, the injunction should have been dissolved.

1 Barb. Ch. Pr., 641. High on Injunctions, §§ 883, 497.

The first allegation of the bill on which the injunction is prayed is "that said buildings are being erected in violation of the building regulations aforesaid, especially Sections 3, 5, 6, 9, 32, 33 & 66." This, if true could hardly afford ground for an injunction. It is questionable if Congress could confer upon the Board of Public Works the power to make building regulations which could have

the validity of laws, so as to make their observance a prerequisite to the citizen's right to control his estate, and their non-observance the ground of equitable interference by injunction, unless the structure were in fact a nuisance. "Equity will not lend its aid to enforce by injunction the ordinances of a Municipal Corporation restraining an act which is not a nuisance *per se*." High on Injunction, § 540. Mayor v. Thorn, 7 Paige, 261.

And if the mere violation of these regulations could afford ground for an injunction, the fact of the violation is not established by the record, as will be seen by an examination of the sections named in the bill. Sections 3, (p. 3,) 5 and 6, (p. 4,) all relate simply to the duty of the inspector. Section 9, (pp. 4, 5,) requires persons about to build to first obtain a permit under a penalty named. The construction of the block did not violate this section. The permit was regularly applied for and granted, (p. 17.) The same section, (p. 5,) requires "that plans and specifications shall be submitted to the inspector whenever he is in doubt as to the propriety of issuing the permit." That this was complied with is shown by the answer of Dainese, (p. 19.) 32 applies to the erection of wooden buildings. It provides "that wooden buildings shall not be placed within less than 24 feet of any house built of brick or other incombustible material." It is shown by Dainese's answer, (p. 20.) that there are no buildings on said square east, and none within 100 feet to the south, and that the nearest building on the west is the *frame* church, represented by Prior, its custodian, whose affidavit to the same effect is on pp. 21, 22. Section 33, (p. 10,) declares that "no wooden building shall exceed the height of two stories up to the flat of the roof," which regulation is expressly waived by the permit, (p. 17.) The last section named is 66, (p. 15,) which merely repeals the building regulations of the late Corporations of Washington and Georgetown when they conflict with these rules.

The allegation that the block was in violation of the building regulations is not sustained, but is disproven.

The next allegation of the bill, 4th section, (p. 1,) is that the mode of construction is dangerous and improper, and such as should not exist in said City. Frey's answer, (p. 19,) denies that the buildings are unsound or dangerous, or that the lumber used therein is rotten or unsound. That Cluss once told him that *if he had built the houses only two stories high he would have found no fault with them.* The answer of Dainese, (p. 20,) denies that the mode of construction is dangerous. They make a full denial of the equity of the bill. The answers of defendants on this issue are further supported by the affidavits of Prior, (p. 21.) Thornton, (p. 22,) Hulse, (p. 23,) and by the affidavits made evidence in this cause by the answers of Dainese, (p. 20.) of Fague, Fry, Short, Stewart, Taylor, Henson, Austin, Frazer, Walker and Chapman, found in the printed record of No. 250 on the docket of this Court, (Dainese

vs. B. P. W.) and found on pages 26, 27, 28, 29 and 30 of the printed record in said cause. The equity of the bill is not only denied in the answers, but the fact is settled in favor of the building's strength by a preponderance of thirteen affiants, the most of them practical builders, many of whom had worked upon the block, and one of whom at least, John Prior, (p. 21,) had a personal interest in knowing that the block was not likely to fall down, as he lived in the nearest building.

Opposed to these are certain certificates not entitled in the cause, pp. 16, 17, 23, which cannot properly be taken in support of the bill, Barb. Ch. Pr., 600. They are four in number and two of them are not sworn to. The record also contains two protests, signed by various persons, *addressed to the Court*, which are certainly out of place in this record if intended to influence the decision of a Court as evidence.

The last allegation in the bill "that the buildings will be of great danger to the community residing in the vicinity of their location, and be productive of great and irreparable loss," is denied by the answer of Dainese, (p. 20,) and is refuted by all the proof.

The opinion of the inspector that the block was unsafe could not be conclusive upon that question against the proof in the record, that the block was not a public nuisance. Yates vs. Milwaukie, 10 Wall 497. Bates vs. The District of Columbia, decided at the April Term of the Supreme Court of the District, and reported in the Washington Law Reporter, Oct. 13, 1874. No. 40, p. 261, *et seq.*

This case involved the question of the power of the Board of Health to declare by ordinance certain establishments nuisances to health, under the law of Congress which prescribed the duty of the Board "to declare what shall be nuisances to health, and to provide for the removal thereof." The Court held that this act conferred no power on the Board to declare anything a nuisance which was not so by the common law, and that the power assumed by the Board could not be conferred on it, because it would practically effect a confiscation of Bates' property "without due process of law." Mr. Justice Wylie concurred, expressing the opinion "that where property was involved in the abatement of a nuisance the proceeding must be by indictment and trial by jury." See also Lake View vs. Letz, 44 Ills. 81; Ryan vs. Brown, 18 Mich., 212.

Even if the good character of the block were not sustained, if there was any doubt as to the question of nuisance, the question should have been determined by a jury before making the injunction perpetual.—High on Injunctions, § 520; Atty General vs. Cohoes, 6 Paige, 133; Mohawk vs. Utica, etc., 6 Paige, 554; Att'y General vs. Cleaver, 18 Ves., 217; Kirkman vs. Handy, 11 Humph., 406; Earl of Ripon vs. Hobart, 3 Mylne and Keene, 169, 2 Story

Eq. Jur., § 924; Dunning vs. Aurora, 40 Ills., 481; Mayor vs. Curtis, 1 Clarke, 336; Butler vs. Rogers, 1 Stockton, N. J. 489, 1 Barb. Ch. Pr. 643, 609; Ramsey vs. Riddle, 1 Cranch, Cir. C. 399.

Had this block been in fact a public nuisance there was adequate remedy at law by indictment, or any person might have abated it. Equity jurisdiction should not have been exercised.—High on Injunctions, § 521; Water, etc., vs. Hudson, 2 Beasley, 420; Att'y General, vs. Utica Ins. Co., 2 John. Ch. R., 371.

It is difficult to see how an injunction stopping all work on an unfinished building in mid winter could afford relief. The affidavit of Hulse (p. 23) shows that the building was in an unfinished state, and would be greatly strengthened when the remaining timbers were put in. The injunction would make that an unsafe building, which, if permitted to be completed, would be perfectly secure.

F. P. CUPPY,
JOHN W. ROSS,
Sols. for Appellant.

ABSTRACT OF THE EVIDENCE IN BEHALF OF APPELLANT, in Nos. 249 and 250, Supreme Court of the United States:

Page 21 of Record 249:

John Prior, being sworn according to law, states that he is the custodian and in charge of the Enon Church, on C street, between Sixth and Seventh streets, which is the nearest building to the building now being erected by Wesley Fry, for F. Dainese, and that I have watched the construction of the said building ever since its commencement, and believe the same solidly built, and not dangerous to the community. I live in the church, and am the nearest neighbor, there being no houses to the east of said building on said square, and none nearer than 100 feet to the south; and I have no objection to said houses, and do not believe they will endanger the life or limb of any persons who may occupy them, after they are finished, or of the buildings falling on the church.

Pages 22 and 23 of Record 249:

Charles E. Hulse, being sworn according to law, states that he is a resident of Washington city, D. C., and has been so for 23 years; that he has examined the building now being erected by Wesley Fry, for Francis Dainese, on C street, between 6th and 7th streets southeast, in said city, and found the lumber well seasoned and much larger and stronger than lumber generally used in the construction of new frame houses. There is none of it rotten or unsound. Affiant has himself had built a number of frame houses, and considers those mentioned and referred to as strong in every respect as any he has seen built. The lumber is, a part of it, second hand, but twice as large as that usually used. The timbers instead of being morticed are joined by 6-inch spikes, which makes them much stronger than if morticed, and, in my opinion, the spikes will last ten times longer than a mortice. The building is perfectly safe, and resisted the terrible storms of the 9th and 10th of December, 1872, whilst some other buildings erected of new lumber were blown down. The building being yet in an unfinished state, will be greatly strengthened when the remaining timbers are put in. Builders generally object to using old or second hand lumber because it has nails in it and is much harder to work than new, but I am of the opinion that it is much stronger and will resist more than new lumber, because it is well seasoned. These are facts of which I am certain, being myself a practical builder of brick and frame houses, having built within the last year upwards of twenty houses in this city, and any objection as to the safety of these particular buildings of Mr. Dainese now in course of construction on the south side of C street, between 6th and 7th streets southeast, are visionary and entirely without cause of any kind.

Pages 22 of Record 249:

Samuel Thornton, being sworn according to law, states that eight years ago he erected for Mr. F. Dainese, on lot 14, in square 140, on Nineteenth street, between L and M, a block of buildings of lumber taken from the same place as that now being used by Wesley Fry in the construction of a block of houses for said Dainese, on C street, between Sixth and Seventh streets southeast. That he built said block by spikes instead of tenons, and it has withstood all the weather and ravages of time so far, and I consider them stronger than if built by tenons. The lumber used on the block now being erected by said Fry is sound and well-seasoned, and stronger than new lumber, and is the same kind of lumber I used in the construction of the block mentioned. All of it was bought from the United States Government, and is difficult to work because it is full of nails and tough, but I regard it as better and stronger than new lumber, because it is well seasoned. I further say that the block in question covered four houses, and was recently raised at once fourteen feet from the ground, and no timbers gave way, although they were *not* tenoned. I have been a resident of this city for ten years, and a practical carpenter and builder for the last sixteen years, and can find no fault whatever with the said building on C street, between Sixth and Seventh, whether as regards the soundness of its lumber or its solidity and safety.

Page 5 of Record 250:

On this 27th day of November, A. D. 1872, personally appeared before me Wesley Fry, who, being duly sworn according to law, deposes and states, that on the 26th of August, 1872, he entered into a contract with Francis Dainese to build a block of four frame houses on C street S. E., between 6th and 7th streets S. E., in the city of Washington, and on the 18th of September, 1872, Adolf Cluss, Inspector of Buildings, after reading said contract, granted affiant a permit to build said houses, which permit is in the name of F. Dainese; that the material of which said building is being erected is in strict accordance with the contract and not unsound or dangerous to the community, and that the building is strongly and substantially erected.

Page 26 of Record 250:

Solomon J. Fague, being sworn according to law, deposes and states that he has been a carpenter and builder in the city of Washington for 10 years, and is now a measurer of builders' work; that he has examined the buildings in progress of erection for Mr. Dainese, and being the same mentioned and forming the subject-matter of this suit, and found the same of second-hand lumber. As to its size, the sills are larger than used generally for such buildings, as also the studding; some few pieces of the lumber are doated

but not so as to weaken or injure the construction of the building. As the building is yet in an unfinished state and the builder is on the work strengthening by braces and studding the central parts of the building, I can see no good reason why the building should be condemned. The timbers are much stronger than many new frames that have come under my observation. I do not believe the building dangerous to the public. The materials are second-hand but well seasoned, and I think the buildings as good and substantial as are usually built.

Pages 28 and 29 of Record 250:

M. A. Austin being sworn according to law states: I have examined the buildings now in course of erection for Mr. Dainese on C street, between 6th and 7th streets east, and found them of frame, intended for four houses. The foundation, composed of heavy oak and chestnut posts, painted with cove tar. The frame is put together without mortising, but seem to be securely fastened with heavy spikes, and the corners and most important joints secured with wrought iron bands. The material is second hand and some a little defective, but the most of it much larger than commonly used where the material is new. The timber is not decayed so as to impair its strength or durability. I am a Lieutenant of Police, and visited the buildings by order of the Major and Superintendent on the 31st October.

Page 30 of Record 250:

Charles G. Walker and L. S. Chapman, being sworn according to law, state that they are carpenters and builders residing in the City of Washington, D. C., and carrying on business, the former for 35 years past, and the latter for 15 years past. They have examined the buildings in progress of erection for Mr. Dainese, being the same mentioned and forming the subject-matter of this suit, and found the same of second-hand lumber. As to its size, the sills are larger than used generally for such buildings, as also the studding. Some pieces of the lumber are doated, but not so as to weaken or injure the construction of the building. As the building is yet in an unfinished state, and the builder is on the work, strengthening by braces and studding the central parts of the building, we can see no good reason why the building should be condemed. The timbers are much stronger than many frames built of new material that have come under our observation. The materials are second-hand, but well seasoned, and we think the buildings as good and substantial as are usually built. Our opinions of the strength of the frame-work are strengthened by the fact that the buildings withstood the severe winds that prevailed last week in its unfinished state.

Page 27 of Record 250:

Alfred Short, being duly sworn, deposes and states that he has examined the building erected by Wesley Fry, for F. Dainese, on C street, between Sixth and Seventh streets southeast, and that the said building is solidly and strongly built, more so than most frame buildings; that the timbers are well braced, and the principal timbers have extra iron braces in addition to the usual braces; that all the timbers are spiked with six-inch spikes, making them more fast to one another than if tenoned; that the whole lumber in said building is good and every way fitted for a frame building of the size of the one in question, the sills being 8 x 6, and most of the scantling 3 x 6. The posts on which the sills stand are of the average thickness of ten inches square, charred and tarred, and sunk three feet in the ground, with platform work at the bottom.

Page 28 of Record 250:

Nicholas Taylor, being by me duly sworn, states that he has worked on the building now in course of erection for Mr. Dainese, by Wesley Fry, on C street, between Sixth and Seventh streets east, and have examined the same carefully, and believe the lumber and material used therein to be sound, and the building not unsafe or dangerous to the public. I have heard read the affidavit of Alfred Short and concur therein.

Page 29 of Record 250:

Alfred Johnson, being by me duly sworn, deposes and says, that he has worked on the building on C street, between Sixth and Seventh streets east, now in course of erection for Mr. Dainese by Wesley Fry, and has thoroughly examined the same, and believes the lumber therein to be sound, and the building not unsafe or dangerous to the public. I have heard read the affidavit of Alfred Short and concur therein.

Page 26 of Record 250:

Dennis Fry, being duly sworn, states that he has worked on the building now in course of erection by Wesley Fry for F. Dainese, on C street, between 6th and 7th streets east, and have examined the same, and believe the same to be safe and sound and the lumber of good material and not dangerous to the public. I have heard read the affidavit of Alfred Short and concur therein.

Page 28 of Record 250:

Lemuel Henson, being sworn, deposes and states that he is a carpenter and builder, and has carefully examined the building which Wesley Fry is now erecting for Mr. Dainese, on C street south, between 6th and 7th streets east, and found the material sound and well braced with iron, besides the usual wooden braces,

do not believe the same unsafe or dangerous to the community. I have heard read the affidavit of Alfred Short and concur therein.

Page 29 of Record 250:

Basil Fraser, being duly sworn, states that he has examined the building which Wesley Fry is erecting for Mr. Dainese on C street south, between 6th and 7th streets east, and believes the same to be of sound material and not unsafe or dangerous to the public. I have heard read the affidavit of Alfred Short and concur therein.

Page 27 of Record 250:

Patrick Stewart, being by me duly sworn, deposes and says that he is a carpenter and builder, and has thoroughly examined the building which Wesley Fry is building, on C street south, between 6th and 7th streets east, and that the timbers therein are sound and well braced with iron, and the same, when finished, will not be dangerous to the public. I have heard read the affidavit of Alfred Short and concur therein.

Supreme Court of the United States.

FRANCIS DAINESE, Appellant,

vs.

THE BOARD OF PUBLIC WORKS of the DISTRICT OF COLUMBIA, Appellees.

38, 39

Nos. ~~249 and 250~~.

APPEALS FROM THE SUPREME COURT OF THE DISTRICT OF COLUMBIA.

BRIEF AND ARGUMENT FOR APPELLEES.

EDWIN L. STANTON,
Of Counsel for Appellees.

M'GILL & WITHEROW, PRINTERS, WASHINGTON, D. C.

Supreme Court of the United States.

FRANCIS DAINESE, Appellant,

vs.

THE BOARD OF PUBLIC WORKS OF THE DISTRICT OF COLUMBIA, Appellees.

Nos. 249, 250.

Appeals from the Supreme Court of the District of Columbia, ordered to be argued together.

BRIEF AND ARGUMENT FOR APPELLEES.

Statement of Cases.

The latter numbered case is the earlier one in its origin. The cause numbered ~~250~~ is a suit in equity brought by Francis Dainese, complainant below and appellant here, in November, 1872, to enjoin the defendants from the threatened removal of frame buildings then in the course of erection. The case numbered ~~249~~ arose upon a bill filed in January, 1873, by the Board of Public Works, to enjoin Dainese from proceeding with the further construction of said buildings, upon the ground that they were being built in violation of the building regulations in force in the District, and were dangerous to life. The causes were heard on January 11, 1873, before Justice Wylie, holding an equity term of the Supreme Court of the District, and Dainese's bill was dismissed, and upon the bill filed by the Board a perpetual injunction was granted against Dainese. The two cases were taken on appeal to the Supreme Court of the District of Columbia, by which both decrees were affirmed "without prejudice."

The bill filed by Dainese merely sets forth that on August 16, 1872, he made a contract with one Frey for the erection of a block of frame houses on "C" street, between Sixth and Seventh, and on September 18, 1872, obtained a building permit from Adolf Cluss, then Inspector of Buildings, and in pursuance of said permit Frey was progressing with the construction of the block conformably (according to complainant's information) to the contract and permit, and without use of insufficient or dangerous material; that complainant had expended $5,000 on the buildings; and that on November 25, 1872, Dainese received a notice from Cluss that unless the buildings were removed they would be taken down by the authorities.

The answer of the Board of Public Works, (pp. 7–8 of Record ~~250~~,) and the separate answer of Cluss, as Inspector of Buildings, (24–25 of Record ~~250~~,) aver that the buildings were not being constructed according to the contract nor according to the permit; that the structures were frail and unsafe to life, "put together without any efforts to properly frame them, or without any of the devices used by skilled mechanics to unite the sticks of timber into a frame-work or house; that insufficient and rotten pieces of timber had been pieced out and spliced to obtain the necessary lengths—merely nailed together, without regard to level, plumb, and bonding;" and that, moreover, if the buildings were removed by the authorities, Dainese would have remedy at law for any injury which he might sustain. It appears from the exhibits accompanying the answers of the Board and of Cluss, (Record ~~250~~, pp. 22, 23,) that the health officer of the District called the attention of the Board of Public Works to the dangerous manner in which the buildings were being erected, and to the fact that "the lumber is old and decayed, and is being put together, three stories high, without mortising, and is objected to by the citizens in the vicinity." It is also shown in the exhibits that inspection of the buildings had been made by S. T. G. Morsell, Thomas C. Wilson, Charles Edmonston, and

Robert I. Fleming, prominent and capable builders, and also by Wm. H. Hoffman, late Inspector of Buildings, New York City.

Morsell reports as follows:

"They are a burlesque on the trade, a damage to the neighborhood, and, in my judgment, will be unsafe for occupancy when completed." * * * *

Wilson as follows:

"In my opinion they are the poorest that I have ever seen. A great portion of the material is decayed, and, from [the] manner they are put up, I think they are unsafe for a family to occupy." * * * * *

Edmonston as follows:

"It is no framed building at all, but a lot of old, half-rotten stuff nailed up, and unsafe to be occupied by human beings, and ought, of right, to be taken down by the public authorities without delay." * * *

Fleming as follows:

"I find the lumber unsound and perfectly worthless for building purposes. The workmanship is of the very worst character. There is not even a particle of framing anywhere to be found, and the whole 'shell' is liable to fall, or to be blown down at any time."

Hoffman as follows:

"I visited and inspected the structures now in course of erection on south side of C street, between 6th and 7th streets, in the city of Washington, D. C., by Francis Dainese, and found them to be constructed with, in the most part, rotten lumber, and in a most unworkmanlike and miserable manner, only supported by the temporary bracing which must be removed, and are not only unsafe, but will never be fit for occupancy. The safety of the public and the appearance of the city demand their immediate removal."

A. B. Mullett, then Supervising Architect of the Treasury Department, certified to the same effect regarding these buildings, as follows:

"I find them composed of unsuitable material, much of it being absolutely rotten, and none of it sound. The

structur' exhibits no signs of mechanical skill, and would be unsafe and unsuitable for occupancy, even if constructed of new lumber. The wind has driven them out of the perpendicular, though now supported by temporary braces of lumber, to be removed on the completion of the work. They are unworthy of the name of buildings, and are a disgrace to the city of Washington."

The bill of the Board of Public Works, filed in cause 38 ~~240~~, alleges, and the answer of Dainese admits, that among the duties devolving upon the Board was that of making regulations in relation to the construction of buildings, and that they adopted and caused to be published building regulations which are found in the records of both cases. The bill alleges that Dainese was constructing a block of houses in violation of certain sections of the building regulations, and in a dangerous and improper manner; that the attention of the Board had been called to the matter by the Board of Health, (as stated above;) and that the buildings had been pronounced by A. B. Mullett, architect, Thomas B. Entwistle, master builder, and others, to be of unsound timber, most of it being rotten, and put together in an insecure manner, so as to be dangerous. It 38 also appears (Record, ~~240~~, pp. 23, 24,) that citizens in the neighborhood protested against the completion of the buildings as being unsafe, and the Trustees of the Public Schools objected to it as being dangerous to the Public School property known as Wallach Building. The bill prayed an injunction against Dainese and Frey from proceeding further with the construction of the buildings. The answers of Dainese and Frey averred that the contract had been made before promulgation of the Board's building regulations, and denied that the buildings were insecure.

Before the hearing of the cases in the court in general term, the buildings had been torn down by direction of the Board of Public Works. This action was taken under the sanction of the decrees of the chancellor enjoining Dainese from completing the buildings, and refusing to enjoin the Board from tearing them down.

Questions involved in both Cases.

In the brief filed in behalf of appellant in the suit originally brought by Dainese (No. 250) the points made are: 39

1. That the material and construction of the buildings were proper.

2. That the Board of Public Works or the Inspector of Buildings had no power to destroy the buildings.

3. That the threatened trespass was of such a character as called for the interposition of a court of equity by injunction.

In appellant's brief in the suit brought by the Board of Public Works (No. 249) the points are: 38

1. That the material and construction of the buildings were improper.

2. That equity jurisdiction should not have been exercised to prevent the completion of the buildings until at least the disputed question as to their material and mode of construction should be determined by a jury.

In the two cases, therefore, there are three questions to be considered:

1. The question of fact as to the material and mode of construction of the houses.

2. The question whether the alleged trespass complained of by Dainese in his bill was of such a nature as to justify the interposition of a court of equity.

3. The question whether a court of equity ought to have interfered to prevent Dainese from completing the buildings.

Points in Behalf of Appellees.

I. As to the question of fact.

The findings of the two courts by which the causes were heard before reaching this forum were adverse to Dainese as respects the material and construction of the houses. Concerning the reopening by this court of a question of fact as to the decision of which both courts

below have concurred, the Supreme Court of the United States, in *The Ship Marcellus*, 1 Black, p. 414, say:

"We have had occasion to remark more than once that where both courts below have concurred in the decisions of questions of fact, under such circumstances, parties ought not to expect this court to reverse such a decree, merely by raising a doubt founded on the number or credibility of witnesses. The appellant in such cases has all presumptions against him, and the burthen of proof cast on him to prove affirmatively some mistake made by the judge below in the law or in the evidence. It will not do to show that on one theory, supported by some witnesses, a different decree might have been rendered, provided there be sufficient evidence to be found on the record to establish the one that was rendered."

See also *Walsh* v. *Rogers*, 13 How., 284.
The Grace Girdler, 7 Wall., 204.

The exception to the competency of the testimony of Morsell, Wilson, Edmonston, Fleming, and Hoffman, concerning the miserable material and construction of the buildings, ought to have been taken in the courts below. It is too late to raise it for the first time here. It is submitted, therefore, that, so far as facts were passed upon by the courts below, their decision against Dainese ought, in neither of the two cases, to be reversed. And in both cases the questions of law therefore arise with respect to houses which were in process of construction, when the two bills were filed, upon a dangerous plan and out of worthless material.

II. As to the questions of law.

These are—

(1.) Whether the alleged trespass complained of by Dainese in his bill was of such a nature as to justify the interposition of a court of equity; and

(2.) Whether, upon the case presented in the bill of the Board of Public Works, a court of equity ought to have interfered to prevent the completion of the buildings.

(3.) Whether, in view of the disposition made of the

whole matter of controversy before the hearing before the Court in General Term, different decrees could have been passed than those which are the subject of the present appeals.

1. Since the facts are to be taken as they were found by the two courts below, the question as to the power of the Board or of the inspector of buildings concerns the destruction of buildings of dangerous plan and of worthless material. No issue was raised upon the pleadings in either case respecting the validity of the building regulations prescribed by the Board; and section 51 of those regulations contains the following, (Rec. 240, p. 12; Rec. 250, p. 19:)

"Upon the refusal or neglect of the owner or other interested party, the inspector of buildings may cause such unsafe or dangerous structure to be taken down, or otherwise made safe, and the cost and charges shall become a lien upon the said estate, to be collected according to law."

And as to the exercise of such power, see Wadleigh *v.* Gilman, 12 Maine, 403; Vanderbilt *v.* Adams, 7 Cowen, 349.

But even if neither the Board nor the inspector had power to destroy the buildings, the threatened trespass was one for which ample remedy could be obtained at law, and "though the modern doctrine of courts of equity in restraining trespass is more liberal than the ancient, yet a strong case of destruction or irreparable mischief must be made out, since courts of law are in general the proper forum for disposing of actions of trespass." (High on Injunctions, sec. 463.)

"It is not the general rule that an injunction will lie in a naked case of trespass where there is no privity of title, and where there is a legal remedy for the intrusion. There must be something *particular* in the case, so as to bring the injury under the head of quieting possession, or to make out a case of irreparable mischief, where the value of the inheritance is put in jeopardy. (Livingston *v.* Livingston, 6 Johns. Ch. R., pp. 500–1.)

2. In the suit brought by the Board an injunction was sought to prevent Dainese from proceeding further with what was likely to result in great special and lasting mischief, namely, loss of life and property by fire or other cause arising out of the dangerous construction and combustible and worthless material of the buildings. The emergency was one which called for preventive remedy. The defense set up in the brief, that "had this block been in fact a public nuisance, there was an adequate remedy at law by indictment, or any person might have abated it," is not available, for it was not set up in the answer. In his answer Dainese relied only upon denial of what was alleged in the bill of complaint filed by the Board.

3. It appears from the record that after the chancellor who first heard the case had enjoined Dainese, and had refused to enjoin the Board, the buildings were torn down.

This disposed of the whole subject-matter in both cases, and consequently the decree of the Court in General Term appealed from here, confirming the judgment of the chancellor without prejudice, was the only decree that could have been passed in the case.

EDWIN L. STANTON,
Of Counsel for Appellees.

See Wood on Nuisances 830-831-857
atty Gen. vs Steward 21 N.J. 340
People vs Vanderbilt 26 N.Y. 287
New Orleans vs Lambert 14 La An. 247